DOCKET

No. 13-1499

Title:	Lanell Williams-Yulee, Petitioner
	v.
	The Florida Bar
Docketed:	June 18, 2014
Lower Ct:	Supreme Court of Florida
Case Nos.:	(SC11-265)
Decision Date:	May 1, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Jun 17 2014	Petition for a writ of certiorari filed. (Response due July 18, 2014)
Jun 30 2014	Waiver of right of respondent The Florida Bar to respond filed.
Jul 9 2014	DISTRIBUTED for Conference of September 29, 2014.
Jul 24 2014	Response Requested. (Due August 25, 2014)
Aug 22 2014	Brief of respondent The Florida Bar in opposition filed.
Aug 26 2014	Reply of petitioner Lanell Williams-Yulee filed.
Sep 3 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 2 2014	Petition GRANTED.
Nov 12 2014	Motion to dispense with printing the joint appendix filed by petitioner Lanell Williams-Yulee.
Nov 17 2014	Brief of petitioner Lanell Williams-Yulee filed.
Nov 21 2014	SET FOR ARGUMENT ON Tuesday, January 20, 2015
Nov 24 2014	Brief amici curiae of American Civil Liberties Union, et al., filed.
Nov 24 2014	Brief amici curiae of Randolph Wolfson, et al. filed.
Nov 24 2014	Brief amicus curiae of The Thomas Jefferson Center for the Protection of Free Expression filed.
Nov 24 2014	Brief amicus curiae of Cameron A. Blau filed.
Dec 1 2014	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 2 2014	Record requested from Supreme Court of Florida.
Dec 8 2014	Record received from Supreme Court of Florida. The record is electronic.
Dec 12 2014	CIRCULATED.
Dec 17 2014	Brief of respondent The Florida Bar filed. (Distributed)
Dec 19 2014	Brief amici curiae of Free Speech for People, and James C. Nelson filed. (Distributed)
Dec 22 2014	Brief amicus curiae of Professor Jed Shugerman filed. (Distributed).
Dec 23 2014	Brief amici curiae of Professors of Law, Economics, and Political Science filed.

	(Distributed)
Dec 23 2014	Brief amici curiae of Public Citizen, Inc. and Democracy 21 filed. (Distributed).
Dec 23 2014	Brief amici curiae of States of Arizona, et al., filed. (Distributed)
Dec 23 2014	Brief amici curiae of State and Local Judicial Reform Groups filed. (Distributed)
Dec 23 2014	Brief amici curiae of Brennan Center for Justice at NYU School of Law, et al. filed. (Distributed)
Dec 23 2014	Brief amicus curiae of The Carter Center filed. (Distributed)
Dec 24 2014	Brief amicus curiae of Conference of Chief Justices filed. (Distributed)
Dec 24 2014	Brief amici curiae of Thomas R. Phillips, et al., filed. (Distributed).
Dec 24 2014	Brief amici curiae of Major B. Harding, et al., filed. (Distributed).
Dec 24 2014	Brief amicus curiae of American Bar Association filed. (Distributrd).
Dec 24 2014	Brief amici curiae of Norman Dorsen, et al., filed. (Distributed)
Jan 13 2015	Reply of petitioner Lanell Williams-Yulee filed. (Distributed)
Jan 20 2015	Argued. For petitioner: Andrew J. Pincus, Washington, D. C. For respondent, Barry Richard, Tallahassee, Fla.
Apr 29 2015	Adjudged to be AFFIRMED. Roberts, C. J., delivered the opinion of the Court, except as to Part II. Breyer, Sotomayor, and Kagan, JJ., joined that opinion in full, and Ginsburg, J., joined except as to Part II. Breyer, J., filed a concurring opinion. Ginsburg, J., filed an opinion concurring in part and concurring in the judgment, in which Breyer, J., joined as to Part II. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined. Kennedy, J., and Alito, J., filed dissenting opinions.
Jun 1 2015	MANDATE ISSUED.

PETITION FOR WRIT OF CERTIORARI

No. 13-1499

In the Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.

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Petitioner Lanell Williams-Yulee respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, 1a-18a) is not yet reported in the Southern Reporter but is available in the Westlaw database at 2014 WL 1698373. The referee's report (App., *infra*, 19a-25a) and order on recommendation (App., *infra*, 26a-30a) are not reported.

JURISDICTION

The final judgment of the Supreme Court of Florida was entered on May 1, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL AMENDMENT AND CANON OF CONDUCT INVOLVED

Canon 7C(1) of the Florida Code of Judicial Conduct provides, in relevant part, that:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy.

The First Amendment, as incorporated against the States by Section 5 of the Fourteenth Amendment (*Gitlow* v. *New York*, 268 U.S. 652, 666 (1925)), provides, in relevant part, that the States "shall make no law * * * abridging the freedom of speech."

STATEMENT

This case presents an important and frequently recurring question of law that has divided the lower courts: Does a rule of conduct that prohibits candidates for judicial office from personally soliciting campaign donations violate the First Amendment? Thirty-nine States provide for the selection or retention of judges by popular vote. And—consistent with the American Bar Association's Model Code of Judicial Conduct—nearly every such State has adopted a rule prohibiting judicial candidates from personally soliciting campaign contributions.

One such provision is Canon 7C(1) of the Florida Code of Judicial Conduct. In this case, Petitioner Lanell Williams-Yulee stood as a candidate for County Court Judge in Hillsborough County, Florida. Shortly after she registered as a judicial candidate, petitioner drafted and signed a mass-mail letter announcing her candidacy and seeking campaign contributions. See App., *infra*, 31a-32a. The Florida Supreme Court publicly sanctioned and imposed costs on petitioner for violating Canon 7C(1), rejecting her First Amendment challenge to the rule.

The lower courts are deeply and expressly divided over the question whether rules like Canon 7C(1) violate the First Amendment. The federal courts of appeals for the Third and Seventh Circuits and the highest courts of Arkansas, Oregon, and (in this case) Florida have held that such laws do *not* violate the First Amendment. By contrast, the federal courts of appeals for the Sixth, Eighth, Ninth, and Eleventh Circuits have held that they *do*.

Proper resolution of the question presented is a matter of tremendous practical importance. Judicial

elections are a frequent occurrence, and rules like Canon 7C(1) play a central role in almost every such contest. It therefore should come as no surprise that rules like Canon 7C(1) are frequently enforced by bar authorities and just as frequently challenged by candidates for judicial office. Yet cases that neatly present the issue for review by this Court are rare, often arising in the context of prospective suits that are complicated by concerns over ripeness or mootness.

Beyond that, there is little doubt that the Florida Supreme Court's decision in this case is wrong. Canon 7C(1) is a content- and speaker-based restriction on political speech; such laws rarely survive strict judicial scrutiny, and this one should not. Immediate review is therefore warranted.

A. Factual background

Petitioner stood as a candidate for County Court Judge in Hillsborough County, Florida, which includes the city of Tampa. App., *infra*, 3a. On September 4, 2009, she signed a mass-mail campaign fundraising letter in which she personally solicited campaign contributions. *Id.* at 31a-32a. After announcing her candidacy, the letter explained that "[a]n early contribution of $25, $50, $100, $250, or $500, made payable to 'Lanell Williams-Yulee Campaign for County Judge', will help raise the initial funds needed to launch the campaign and get our message out to the public." *Id.* at 32a. The letter concluded with petitioner's signature. *Ibid.* At the time petitioner signed the letter, there were no other announced candidates for the judgeship. *Id.* at 3a.

B. Procedural background

Respondent filed a complaint against petitioner in the Supreme Court of Florida, alleging (insofar as

relevant here) a violation of Canon 7C(1) of the Florida Code of Judicial Conduct. App., *infra*, 2a.

1. The matter was referred to a referee (akin to a magistrate), who recommended a finding of guilt. App., *infra*, 19a-30a. Observing that Canon 7C(1) applies by its terms only to elections "between competing candidates," petitioner testified that she had read the canon as not applying to candidates in uncontested races. *Id.* at 27a. But the referee rejected that interpretation, holding that the words "between competing candidates" are "used to describe the *type* of judicial office where the prohibition would apply," and not the case-by-case circumstances of any particular race. *Id.* at 27a-28a (emphasis added). Thus, while finding that petitioner's violation of the canon was based on a good faith mistake as to its meaning, the referee recommended a finding of guilt because "the reason for violation" is irrelevant. *Id.* at 28a.

With respect to discipline, the referee found that petitioner had no prior disciplinary history; had no dishonest or selfish motive; made a timely and good faith effort to rectify her misconduct; and was fully cooperative with the disciplinary board. App., *infra*, 22a-23a. The referee accordingly recommended that petitioner receive a public reprimand and pay the costs of the proceedings. *Id.* at 23a-24a.

2. The Florida Supreme Court approved the referee's findings of fact and recommendation of guilt against petitioner "for personally soliciting campaign contributions in violation of Canon 7C(1) of the Florida Code of Judicial Conduct." App., *infra*, 1a. In do-

ing so, the court rejected Yulee's argument that Canon 7C(1) violates the First Amendment.[1]

The court began by acknowledging that, because "Canon 7C(1) clearly restricts a judicial candidate's speech," it "must be narrowly tailored to serve a compelling state interest." App., *infra*, 7a. But the court quickly held that "Florida has 'a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary,'" observing that "other state supreme courts that have addressed the constitutionality of judicial ethics canons similar to Florida's Canon 7C(1) have reached the same conclusion." *Id.* at 7a, 10a.

As for narrow tailoring, the court explained that "personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impartiality." App., *infra*, 11a. The canon "is narrowly tailored," the court concluded, because candidates still may "utilize a separate campaign committee to engage in the task of fundraising" on their behalves, thereby "leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns." *Id.* at 15a.

In reaching that conclusion, the court explained that Canon 7C(1) is "similar to Canons 4.1(A)(8) and 4.4 of the American Bar Association Model Code of Judicial Conduct" and that "[a] majority of states have enacted similar provisions" and "every state

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[1] The court rejected the referee's recommendations concerning a separate alleged violation respecting certain statements made to a reporter. App., *infra*, 2a, 15a-16a. Petitioner was found guilty of violating only Canon 7C(1).

supreme court that has examined the constitutionality of comparable state judicial ethics canons has concluded that these types of provisions are constitutional." App., *infra*,11a-13a. The court acknowledged, however, that "the federal courts," "whose judges have lifetime appointments and thus do not have to engage in fundraising," "are split." *Id.* at 13a n.3.

Chief Justice Polston and Justice Canady dissented in part without opinion. App., *infra*, 18a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether a rule of conduct that prohibits candidates for judicial office from personally soliciting campaign donations violate the First Amendment. In conflict with the Sixth, Eighth, Ninth, and Eleventh Circuits, but in agreement with the Third and Seventh Circuits and the highest courts of Arkansas and Oregon, the Florida Supreme Court held that it does not.

That decision should not stand. Aside from deepening a recognized conflict among the lower courts, it departs from this Court's settled First Amendment precedents and chills speech by candidates for public office, with respect to whom "the First Amendment has its fullest and most urgent application." *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). The issue arises in hundreds of elections for judicial office held throughout the Nation every year. And this case presents a suitable vehicle with which to resolve the conflict. Further review accordingly is warranted.

A. There is a deep and acknowledged conflict over the question presented

The decision below exacerbates a well-established conflict among both state supreme courts and the federal courts of appeals. This division of authority is especially pernicious because federal and state courts are in disagreement within overlapping territorial jurisdictions; the constitutional status of Canon 7C(1), for example, now turns on whether it is raised by respondent in an enforcement proceeding in state court (where it will be held valid under the Florida Supreme Court's decision in this case) or instead challenged prospectively by a judicial candidate in a civil action in federal court (where it will be held to violate the Constitution under the Eleventh Circuit's conflicting precedent). Only this Court can rectify this untoward result.

1. Here, the Florida Supreme Court held that Canon 7C(1) is narrowly tailored to achieve the compelling state interest of ensuring an impartial judiciary. App., *infra*, 1a-15a.

The **Seventh Circuit** reached a similar conclusions in *Bauer* v. *Shepard*, 620 F.3d 704 (7th Cir. 2010) and *Siefert* v. *Alexander*, 608 F.3d 974 (7th Cir. 2010). In those cases, sitting judges challenged the personal solicitation bans of Wisconsin and Indiana, respectively. The Seventh Circuit upheld the prohibitions against First Amendment attack, reasoning that each "solicitation ban is drawn closely enough to the state's interest in preserving impartiality and preventing corruption to be constitutional." *Siefert*, 608 F.3d at 990; *accord Bauer*, 620 F.3d at 710.

The **Arkansas Supreme Court** came to the same conclusion in *Simes* v. *Arkansas Judicial Dis-*

cipline and Disability Commission, 247 S.W.3d 876 (Ark. 2007). There, a sitting judge was censured for personally soliciting contributions to his reelection campaign. In rejecting the judge's First Amendment attack on Arkansas's personal solicitation ban, the Arkansas court concluded that Akansas's ban is "narrowly tailored" to the State's "compelling" interest in avoiding "the appearance of impropriety or impartiality." *Id.* at 881, 884.

The **Third Circuit** upheld Pennsylvania's ban on personal solicitations in *Stretton* v. *Disciplinary Board of Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir. 1991). There, the plaintiff "wishe[d] to send a letter over his signature soliciting money" in support of his campaign for judicial office but was prevented from doing do by a rule indistinguishable from Canon 7C(1). *Id.* at 145. The Third Circuit upheld the rule against First Amendment challenge: "A compelling state interest is present," the court explained, "and the means currently employed are narrowly tailored to further it." *Id.* at 146.

Finally, the **Oregon Supreme Court** held that Oregon's prohibition on the "[p]ersonal solicitation of campaign funds by a candidate for judicial office" likewise is constitutional. *In re Fadeley*, 802 P.2d 31, 32 (Or. 1990) (per curiam). That case, like this one, involved the public censure of a candidate who "personally solicited campaign finance pledges from" the public. *Id.* at 33. The court recognized that "seeking donations to support a campaign for elective office (including judicial office) is a form of speech" and "political expression," but reasoned that the personal solicitation ban passed strict scrutiny because "the means chosen to carry out the state's purpose are the least intrusive possible." *Id.* at 44.

2. In square conflict with the decisions of the Third and Seventh Circuits and the supreme courts of Arkansas, Florida, and Oregon, four other federal courts of appeals have held that personal solicitation bans fail strict scrutiny and therefore violate the First Amendment.

Most recently, the **Ninth Circuit**, in *Wolfson* v. *Concannon*, 2014 WL 1856390 (9th Cir. May 9, 2014), pet. for reh'rg filed (9th Cir. June 6, 2014), held unconstitutional Arizona's personal solicitation ban, which, like Florida Canon 7C(1), prohibits candidates for judicial office from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee." *Id.* at *8. Although recognizing that "Arizona, like every other state, has a compelling interest in the reality and appearance of an impartial judiciary" (*id.* at *1), the court concluded that "[t]he lack of narrow tailoring is obvious here" (*id.* at *8). Arizona's personal solicitation ban "is unconstitutional as applied to non-judge judicial candidates," the court concluded, "because it restricts speech that presents little to no risk of corruption or bias towards future litigants and is not narrowly tailored to serve those state interests." *Ibid.*

That holding is in line with the **Sixth Circuit's** recent decision in *Carey* v. *Wolnitzek*, 614 F.3d 189 (6th Cir. 2010). There, the court addressed the constitutionality of Kentucky's personal solicitation ban, which, like the ban in *Wolfson* and this case, provides that "a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy." *Id.* at 195. Like the Ninth Circuit in *Wolfson*, the Sixth

Circuit in *Carey* concluded that the ban "serves Kentucky's compelling interest in an impartial judiciary." *Id.* at 204. But, in the Sixth Circuit's view, the "[t]he solicitation clause is overbroad and thus invalid on its face." *Id.* at 207. While a solicitation ban limited to "one-on-one solicitations or solicitations from individuals with cases pending before the court" might be "narrowly tailored," the court explained, one that applies "to mass-mailing solicitations or speeches to a large audience" is not. *Id.* at 206.

The **Eighth Circuit** reached the same conclusion in *Republican Party of Minnesota* v. *White*, 416 F.3d 738 (8th Cir. 2005) (en banc) (*White II*), in an en banc opinion issued on remand from this Court's decision in *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002) (*White I*). Like the other courts, the Eighth Circuit agreed that judicial impartiality is "a state interest that is compelling." *White II*, 416 F.3d at 753. But, it concluded, a blanket ban on personal solicitations is overbroad: Minnesota's "proscriptions against a candidate personally signing a solicitation letter or making a blanket solicitation to a large group, does not advance any interest in impartiality." *Id.* at 765-766. The personal solicitation ban thus "do[es] not survive strict scrutiny" and "violate[s] the First Amendment." *Id.* at 766.[2]

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[2] The Eight Circuit thought it relevant that the Minnesota rules (1) required contributions, however solicited, to be made to a campaign committee and (2) "prevent[ed] a candidate from knowing the identity of contributors" to the committee. *White II*, 416 F.3d at 765-766. That admittedly is not true of the Florida scheme. And following *White II*, Minnesota promulgated a more narrowly-tailored rule allowing for, among other things, candidate signatures on mass-mail solicitation letters; the Eighth Circuit upheld the revised rule in *Wersal* v. *Sexton*, 674 F.3d 1010 (8th Cir. 2012) (en banc).

Finally, the Eleventh Circuit invalidated Georgia's personal solicitation ban in *Weaver* v. *Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002). Like Florida Canon 7C(1), Georgia "Canon 7(B)(2) prohibits judicial candidates from personally soliciting campaign contributions and from personally soliciting publicly stated support, but allows the candidate's election committee to engage in these activities." *Id.* at 1322. "In effect," according to the Eleventh Circuit, "candidates are completely chilled from speaking to potential contributors." *Ibid.* The Georgia canon "fails strict scrutiny because it completely chills a candidate's speech * * * while hardly advancing the state's interest in judicial impartiality at all." *Id.* at 1323.

3. The conflict described above is expressly recognized: According to the Florida Supreme Court, the lower courts "are split" (app., *infra*, 13a n.3); and according to the Seventh Circuit, there is a "conflict among the circuits" (*Bauer*, 620 F.3d at 710). And, indeed, there is little doubt that if the constitutionality of Canon 7C(1) had been litigated in federal court in the Sixth, Eighth, Ninth, or Eleventh Circuits, the canon would have been invalidated. That observation is particularly troubling because, as we noted earlier, Florida is located *within* the Eleventh Circuit.[3]

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[3] It is not in fact certain that that the Seventh Circuit or the supreme courts of Arkansas and Oregon would align with the Florida Supreme Court in this case. Unlike here (and in *Stretton*), *Bauer*, *Siefert*, *Simes*, and *Fadeley* involved solicitations by *sitting* judges. In the Ninth Circuit's view, the constitutional balance may differ in cases involving incumbent candidates as compared with "non judge candidates." *Wolfson*, 2014 WL 1856390, at *8; see also *id.* at *17 (Berzon, J., concurring). But we are skeptical of any constitutional distinction between incumbents and non-incumbents, which would subject competitors in a single election to different First Amendment rules.

For these reasons, the Court should grant review without further delay. The conflict is clear and developed, and the courts that have addressed the question presented have done so in thoroughly reasoned opinions. Further percolation of the issue is therefore unlikely to shed any additional light on the various aspects of the debate. Given the entrenched disagreement among them, moreover, the lower courts cannot themselves "create harmony" on the question presented. *Bauer*, 620 F.3d at 710. Only this Court's intervention can restore uniformity to the application of the First Amendment in this important context.

B. The question is cleanly presented here and is a matter of great importance

The petition should be granted for the additional reasons that the question presented is a matter of tremendous day-to-day importance, and this case is an ideal vehicle for resolving it. Judicial elections are common, and proper resolution of the question presented affects virtually every such election.

1. At least 39 States have some form of popular election for judges.[4] Among those 39 States, 30 have promulgated laws or rules of conduct prohibiting judicial candidates from personally soliciting campaign

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[4] In Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia, all general-jurisdiction judges are appointed by the governor or legislature, either for life or initially for a term, subject to periodic reconfirmation by the governor or legislature. See *Carey*, 614 F.3d at 214-217.

contributions in one form or another.[5] Among those 30 personal solicitation bans, 22 are the same sort of stand-alone, blanket prohibition as Canon 7C(1).[6]

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[5] The States that hold judicial elections in some form or another and permit judicial candidates to solicit campaign contributions personally are Alabama and Texas, which hold partisan elections; Georgia, Montana, Nevada, and North Carolina, which hold nonpartisan elections; and California, Kansas, and Maryland, which hold retention elections. See *Carey*, 614 F.3d at 214-217; Iowa Code of Jud. Cond. 51:4.1(A)(8); S.D. Code of Jud. Conduct, Canon 5(A)(1)(e).

[6] See Alaska Code of Jud. Conduct, Canon 5C(3); Ariz. Code of Jud. Conduct, Rule 4.1(A)(6); Ark. Code of Jud. Conduct, Rule 4.1(A)(8); Colo. Code of Jud. Conduct, Rule 4.1(A)(8); Fla. Code of Jud. Conduct, Canon 7C(1); Ill. Code of Jud. Conduct, Canon 7B(2); Ind. Code of Jud. Conduct, Rule 4.1(A)(8); Iowa Code of Jud. Cond. 51:4.1(A)(8); Ky. Sup. Ct. R. 4.300, Canon 5(B)(2); La. Code of Jud. Conduct, Canon 7D(1); Mich. Code of Jud. Conduct, Canon 7B(2)(a); Miss. Code of Jud. Conduct, Canon 5C(2); Neb. Code of Jud. Conduct, Rule 5-304.1(A)(8); Okla. Code Jud. Conduct, Canon 4.1(A)(8); Oregon Code of Jud. Conduct, Rule 5.1(A)(2); Pa. Code of Jud. Conduct, Canon 7B(2); S.D. Code of Jud. Conduct, Canon 5(A)(1)(e); Tenn. Code of Jud. Conduct, Rule 4.1(A)(8); Utah Code of Jud. Conduct, Rule 4.2(B)(2); Wash. Code of Jud. Conduct, Rule 4.1(A)(7); W. Va. Code of Jud. Conduct, Canon 5C(2); Wis. Code of Jud. Conduct, Rule 60.06(4).

The relevant authorities in Idaho, Minnesota, Missouri, New Mexico, North Dakota, Ohio, and Wyoming have adopted solicitation rules for judicial candidates that vary from Florida's stand-alone blanket ban. Some prohibit personal solicitations and *also* prohibit committees from informing candidates of who has contributed. See Idaho Code of Jud. Conduct, Canon 5C(2); Wyo. Code of Jud. Conduct, Rule 4.2(B)(4)-(5). Others provide exceptions for solicitations by mail or to large audiences, family members, sitting judges, and the like. See Minn. Code of Jud. Conduct, Rules 4.1(A)(6), 4.2(B)(3); Mo. Code of Jud. Conduct, Canon 2-4.1(B); N.M. Code of Jud. Conduct, Rule 21-800; N.D. Code of Jud. Conduct, Rule 4.6; Ohio Code of Jud. Conduct, Rule 4.4(A).

That should come as no surprise; Canon 7C(1) and rules like it are consistent with the ABA's Model Code of Judicial Conduct. See app., *infra*, 11a & n.1.

And recent data show that there are hundreds of judicial elections every year. In 2011 and 2012, for example, there were elections for 75 open seats for state high court judgeships in 35 States. Linda Casey, *Courting Donors: Money in Judicial Elections, 2011 and 2012* (Mar. 18, 2014) (permanently archived at http://perma.cc/6G8C-QCUM). Two hundred and forty-three intermediate appellate court races were decided in 29 States over the same two-year period. *Ibid.* Predictably, laws like Canon 7C(1) are thus frequently enforced in published decisions[7] and also frequently subjected to constitutional challenge.[8] Resolution of this petition is therefore a matter of frequently recurring importance.

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[7] See, *e.g.*, *In re Sanders*, 777 N.W.2d 134 (Mich. 2010); *In re Disciplinary Proceedings Against Kessler*, 789 N.W.2d 744 (Wis. 2010); *In re Singletary*, 967 A.2d 1094 (Pa. Ct. Jud. Disc. 2008); *In re Cannizzaro*, 901 So. 2d 1035 (La. 2005); *Disciplinary Counsel v. O'Neill*, 815 N.E.2d 286 (Ohio 2004); *In re King*, 857 So. 2d 432 (La. 2003); *In re Tennant*, 516 S.E.2d 496 (W. Va. 1999); *In re Mendez*, 450 S.E.2d 646 (W. Va. 1994); *In re Discipline of Hopewell*, 507 N.W.2d 911 (S.D. 1993); *In re Karr*, 387 S.E.2d 126 (W. Va. 1989); *In re Hotchkiss*, 327 N.W.2d 312 (Mich. 1982).

[8] In addition to *Wolfson*, *Carey*, *Siefert*, *Bauer*, *Simes*, *White II*, *Weaver*, and *Fadeley*, see, *e.g.*, *Platt* v. *Bd. of Comm'rs*, No. 1:13-cv-435 (S.D. Ohio Jan. 6, 2014), appeal docketed No. 14-3037 (6th Cir. Jan. 13, 2014); *Ohio Council 8 Am Fed'n of State, Cnty., & Mun. Emps.* v. *Brunner*, 912 F. Supp. 2d 556 (S.D. Ohio 2012); *Wersal*, 674 F.3d 1010, 1016 (2012); *Republican Party of Minn.* v. *Kelly*, 247 F.3d 854 (8th Cir. 2001), rev'd, 536 U.S. 765 (2002); and *Nicholson* v. *State Comm'n on Judicial Conduct*, 409 N.E.2d 818 (N.Y. 1980) (per curiam).

2. Although the question presented arises often, suitable vehicles with which to address it are rare. This case offers such a vehicle.

The Florida Supreme Court expressly reached and clearly decided the federal constitutional issue, and none of the relevant facts is in dispute. And this case involves a mass mailing by a non-judge candidate—precisely the kind of innocuous communication that the Sixth, Eighth, and Ninth Circuits expressly agree is protected by the First Amendment. See *Wolfson*, 2014 WL 1856390 at *8; *Carey*, 614 F.3d at 206; *White II*, 416 F.3d at 765-766.

Moreover, the Florida Supreme Court held that petitioner's solicitation letter violated Canon 7C(1), and it disciplined her with a public reprimand as a result. "Public reprimands are serious sanctions" (*Miss. Comm'n on Judicial Performance* v. *Brown*, 761 So. 2d 182, 185 (Miss. 2000) (en banc)), entailing substantial "stigma" for those subject to them (*The Florida Bar* v. *Stein*, 471 So.2d 36, 37 (Fla. 1985)). Petitioner also was required to pay $1,860.30 in costs because she was adjudged guilty. App., *infra*, 25a. Thus there is no doubt that a live controversy will persist throughout the remainder of this appeal, with the constitutionality of Canon 7C(1) as the sole remaining issue.

By contrast, the question presented more often arises in the context of *prospective* suits involving requests for declaratory and injunctive relief, which rarely offer clean vehicles for review. Such suits typically include broadside challenges to a litany of candidate speech restrictions, including not just personal solicitation bans, but also political endorsement

bans and political speech bans.[9] We are unaware of any prospective suit that has challenged a personal solicitation ban alone. Prospective challenges are also complicated by concerns over ripeness on the one hand, and mootness on the other.[10]

This case suffers from none of the same problems. Here, the constitutionality of the personal solicitation ban is presented independently, in the context of an adjudication of guilt and imposition of sanctions that guarantee an ongoing controversy.

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[9] In *Wolfson*, for example, the plaintiff challenged five different provisions of the Arizona Code of Judicial Conduct. 2014 WL 1856390, at *1-*2. Multiple rules were challenged in *Carey*, *Siefert*, *Bauer*, and *White II*, as well. Thus, in *Bauer*, the plaintiff filed a petition for a writ of certiorari presenting *fourteen* questions for review by this Court, only two of which were related to the personal solicitation ban. See Pet. for a Writ of Cert. i-iii, *Bauer* v. *Shepard*, 2010 WL 3777218 (U.S. Sept. 24, 2010), cert. denied, 131 S. Ct. 2872 (2011).

[10] See, *e.g.*, *Wersal*, 674 F.3d at 1018-1019 (challenge not ripe), cert. denied, 133 S. Ct. 209 (2012); *Carey*, 614 F.3d at 196 (addressing whether the plaintiff "file[d] his claims too early, making them unripe for judicial review, or too late, making them moot"); *Bauer*, 620 F.3d at 708 (similarly addressing ripeness and mootness).

In *Wolfson*, the district court initially dismissed the case as moot because the plaintiff lost his election. See *Wolfson* v. *Brammer*, 2009 WL 102951, at *1-*3 (D. Ariz. 2009). The Ninth Circuit later reversed the district court's dismissal because Wolfson had expressed, in 2008, an "inten[t] to seek elected judicial office in the future." *Wolfson* v. *Brammer*, 616 F.3d 1045, 1054 (9th Cir. 2010). It is unclear whether that claim remains true today; Wolfson ran for judicial office in 2006 and 2008, but he apparently has not run since. See Opening Br. 3, *Wolfson* v. *Concannon*, No. 11-17634 (9th Cir. Feb. 8, 2012).

C. Canon 7C(1) violates the First Amendment

Although the clean presentation of a question of significant practical importance implicating a deep, pervasive split among the lower courts is sufficient reason for the Court to grant certiorari, the need for review is especially acute in this case because the decision below is manifestly wrong.

1. The First Amendment prohibits laws "abridging the freedom of speech," which, "'as a general matter * * * means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002) (quoting *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)). Campaigns for elected office are at the "core" of the First Amendment; "[i]ndeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu*, 489 U.S. at 223.

In this context, as in all others, "any restriction based on the content of the [regulated] speech must satisfy strict scrutiny," meaning that it "must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 469 (2009). Here, there is no denying that personal solicitation bans like Canon 7C(1) "are content- and speaker-based restrictions on political speech" that expressly limit what a candidate may say in the course of his or her campaign. *Wolfson*, 2014 WL 1856390, at *4. There is equally no denying that "[s]trict scrutiny [therefore] applies to this First Amendment challenge." *Ibid.*; see also, *e.g.*, *Carey*, 614 F.3d at 198 ("[s]trict scrutiny applies"); *White II*, 416 F.3d at 764 ("strict scrutiny is clearly invoked").

The court below recognized as much: because Canon 7C(1) "clearly restricts a judicial candidate's speech," it "must be narrowly tailored to serve a compelling state interest." App., *infra*, 7a.[11]

2. "[I]t is the rare case in which [this Court has] held that a law survives strict scrutiny" (*Burson* v. *Freeman*, 504 U.S. 191, 211 (1992)), and this case is not one of those rare ones. "To survive strict scrutiny, * * * a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest" (*id.* at 199) and "that it does not 'unnecessarily circumscribe protected expression'" (*White I*, 536 U.S. at 775 (quoting *Brown* v. *Hartlage*, 456 U.S. 45, 54 (1982)). Respondent cannot come close to making that showing.

The lower court concluded that "protecting the integrity of the judiciary, as well as maintaining the public's confidence in an impartial judiciary, represent compelling State interests capable of withstanding constitutional scrutiny." App., *infra*, 10a. Though there are many ways to understand the "meaning of 'impartiality' in the judicial context," the meaning that the personal solicitation ban is intended to serve "is the lack of bias," which is associated with the State's interest in "assur[ing] equal application of the law." *White I*, 536 U.S. at 775-776. Impartiality in

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[11] The Seventh Circuit characterized Wisconsin's personal solicitation ban as "a campaign finance regulation" that is "reviewed under the framework set forth in *Buckley v. Valeo*," which requires only "'closely drawn' scrutiny." *Seifert*, 608 F.3d at 988. We are unaware of any other court to have followed the Seventh Circuit's lead on that score, and respondent did not argue before the lower court that anything other than strict scrutiny should apply here. Regardless, any additional confusion among the lower courts concerning the standard of review counsels further in favor of granting the petition.

this sense "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Id.* at 776.

There is little doubt that impartiality, so understood, is a compelling state interest—but Canon 7C(1) both "does too much, [and] does too little, to advance" it. *Carey*, 614 F.3d at 201. On the one hand, it does too *much* because "the canon prohibits a range of [indirect] solicitations, including speeches to large groups and signed mass mailings," that "present little or no risk of undue pressure or the appearance of a quid pro quo." *Id.* at 205. The "reproduction of a candidate's signature on a contribution letter will not magically endow him or her with a power to divine, first, to whom that letter was sent, and second, whether that person contributed to the campaign or balked at the request." *White II*, 416 F.3d at 765. Thus "[n]o one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge." *Carey*, 614 F.3d at 205. The same is true of speeches "to large assemblies of voters." *White II*, 416 F.3d at 765.

On the other hand, a personal solicitation ban does too *little* because, "[a]lthough the candidate *himself* may not solicit donations, his campaign *committee* may." *Carey*, 614 F.3d at 205 (emphasis added). "[I]f impartiality or absence of corruption is the concern, what is the point of prohibiting judges from *personally* asking for solicitations or signing letters, if they are free to know who contributes and who balks at their *committee's* request" in their stead? *Wolfson*, 2014 WL 1856390, at *8 (emphasis added). As the Eleventh Circuit succinctly concluded, "[the] risk [of bias] is not significantly reduced by

allowing the candidate's agent to seek these contributions and endorsements on the candidate's behalf rather than the candidate seeking them himself." *Weaver*, 309 F.3d at 1322-1323. That is especially so because, although "the clause prevents judicial candidates from saying 'please, give me a donation,' it does *not* prevent them from saying 'thank you' for a donation given." *Carey*, 614 F.3d at 205 (emphasis added). See, *e.g.*, Judicial Ethics Opinion 2007-2, 162 P.3d 985 (Okla. Jud. Eth. Adv. Panel 2007) (advising that a judicial candidate may write personal "thank you" notes to contributors).

The proof of the pudding is in the eating. The West Virginia Code of Judicial Conduct contains a rule substantially identical to Florida Canon 7C(1). See W. Va. Code of Jud. Conduct, Canon 5C(2). Yet this Court, in *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868 (2009), held that certain donations to a West Virginia candidate's campaign committee and a separate political action committee—donations that were *not* alleged to violate West Virginia's personal solicitation ban—created "a serious risk of actual bias" all the same. *Id.* at 884.

The Florida Supreme Court's contrary reasoning is unpersuasive. In its view, "personal solicitation of campaign funds, *even by mass mailing*, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impartiality." App., *infra*, 11a (emphasis added). But apart from citing a handful of conclusory statements of other courts (*id.* at 8a-10a), the Florida Court gave no real explanation for why that is so. And while it was correct to note that petitioner "was not completely barred from soliciting campaign funds" because she could "utilize a separate campaign committee to engage in the task

of fundraising" (*id.* at 15a), the establishment of a committee—as we have just explained—does little if anything to promote the appearance or actuality of impartiality. See *Carey*, 614 F.3d at 205; *Weaver*, 309 F.3d at 1322-1323. Cf. *Caperton*, *supra*.

3. Against this backdrop, "[t]he lack of narrow tailoring is obvious." *Wolfson*, 2014 WL 1856390, at *8. Indeed, even the Seventh Circuit agreed that personal solicitation bans like Canon 7C(1) are overbroad. *Bauer*, 620 F.3d at 710. The court was not troubled by that conclusion, however, because it believed that "[i]t is the nature of rules to be broader than necessary in some respects." *Ibid.* But that is not the standard when it comes to the First Amendment. The animating purpose of the narrow-tailoring requirement is "to ensure that speech is restricted no further than necessary to achieve the [State's asserted] goal, for it is important to assure that legitimate speech is not chilled or punished." *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004). Otherwise, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole." *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003) (citation omitted).

The risk of chilling is evident in this case. Apart from directly "suppress[ing] speech in the most conspicuous of ways" (*Carey*, 614 F.3d at 204), personal solicitation bans encourage candidates for judicial office to censor themselves in communications of every sort for fear that what they say may be taken as a solicitation of financial support. For example, the Kentucky Ethics Commission has interpreted Kentucky's solicitation ban to cover any communication in which

a candidate may happen to make her "wants or desires" for campaign contributions "known," regardless whether the communication is a "personal appeal" or an "advertisement." Judicial Ethics Opinion JE-42 (Eth. Comm. Ky. Jud. 1983) (permanently archived at http://perma.cc/77FU-Z7YG). Thus, as the Eleventh Circuit put it, candidates subject to solicitation bans "are completely chilled from speaking to potential contributors" in any way. *Weaver*, 309 F.3d at 1322. Some prospective candidates may even be discouraged from running for judicial office at all. Cf. *White II*, 416 F.3d at 746 ("Wersal, fearful that other complaints might jeopardize his opportunity to practice law, withdrew from the race.").

More generally, personal solicitation bans favor "incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." *Carey*, 614 F.3d at 204. That is not an outcome this Court should countenance.

That is not to say that state interest at issue here is unimportant. But "[i]t is the general practice of electing judges, not the specific practice of judicial campaigning, that gives rise to impartiality concerns." *Wolfson*, 2014 WL 1856390, at *6 (quoting *Weaver*, 309 F.3d at 1320); see also *White I*, 536 U.S. at 792 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."). And it goes without saying that "if a State opts to select its judges through popular elections, it must comply with the First Amendment in doing so." *Carey*, 614 F.3d at

210. By the same token, "[u]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, * * * the cost of campaigning requires judicial candidates to engage in fundraising." *White I*, 536 U.S. at 789-790 (O'Connor, J., concurring). Yet that is no justification for suppressing constitutionally protected speech. In other words, Florida "cannot have it both ways"; it may not choose both to "elect its judges" and also to prohibit candidates for judicial office from undertaking the constitutionally-protected practices that elections, by their nature, entail. *Geary* v. *Renne*, 911 F.2d 280, 294 (9th Cir. 1990) (en banc) (Reinhardt, J., concurring). The Florida Supreme Court's contrary conclusion rests on the "notion that the special context of electioneering justifies an *abridgment* of the right to speak"; that, of course, "sets [this Court's] First Amendment jurisprudence on its head." *White I*, 536 U.S. at 781.[12]

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[12] Because a substantial number of its applications are unconstitutional, Canon 7C(1) is overbroad and violates the First Amendment on its face. See *Carey*, 614 F.3d at 207 ("The solicitation clause is overbroad and thus invalid on its face."). If the Court concludes that facial invalidation is not called for here, Canon 7C(1) is, at minimum, invalid as applied to petitioner, who is a non-judge candidate who merely signed a mass-mailing. See *Wolfson*, 2014 WL 1856390, at *8 ("The solicitation clause is invalid as applied to non judge candidates.").

CONCLUSION

The petition should be granted.

Respectfully submitted.

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JUNE 2014

APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

No. SC11-265

THE FLORIDA BAR,
Complainant,
v.
LANELL WILLIAMS-YULEE,
Respondent.

[May 1, 2014]

PER CURIAM.

We have for review a referee's report recommending that the Respondent, Lanell Williams-Yulee, be found guilty of professional misconduct. The referee recommended that the Respondent receive a public reprimand as a sanction. We have jurisdiction. *See* art. V, § 15, Fla. Const.

For the reasons explained below, we approve the referee's findings of fact and recommendation that the Respondent be found guilty of violating Rule Regulating the Florida Bar 4-8.2(b) (Judicial and Legal Officials, Candidates for Judicial Office; Code of Judicial Conduct Applies) for personally soliciting campaign contributions in violation of Canon 7C(1) of the Florida Code of Judicial Conduct. We therefore reject the Respondent's constitutional challenge to the ban imposed by Canon 7C(1) on a judicial candi-

date's personal solicitation of campaign contributions, and hold that the Canon is constitutional because it promotes the State's compelling interests in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary, and that it is narrowly tailored to effectuate those interests.

We disapprove the referee's findings of fact and recommendation of guilt regarding the Respondent's alleged violation of rules 3-4.3 (Misconduct and minor misconduct) and 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another). We approve the referee's recommended sanction of a public reprimand.

FACTS

The Florida Bar filed a complaint against the Respondent, alleging that she engaged in misconduct in violation of the Rules Regulating the Florida Bar. A referee was appointed, but the proceedings were stayed pending this Court's disposition of Inquiry Concerning a Judge, N. James Turner, No. SC09-1182, which involved the same First Amendment constitutional challenge to Canon 7C(1) that the Respondent raised before the referee and has now raised on review. Ultimately, however, this Court declined to decide the First Amendment issue in that case. *See In re Turner*, 76 So. 3d 898, 901 (Fla. 2011).

Following this Court's resolution of Turner, the stay was lifted and the referee heard the Respondent's motion challenging the sufficiency of the complaint on the dual bases of delay and the constitutionality of Canon 7C(1). The referee denied the Re-

spondent's motion. After holding hearings, the referee submitted a report to the Court, making the following factual findings and recommendations.

In September 2009, the Respondent became a candidate for County Court Judge, Group 10, Hillsborough County, Florida. On September 4, 2009, the Respondent signed a campaign fundraising letter, in which she personally solicited campaign contributions. The Respondent admitted to having reviewed and approved the letter.

At the time she signed the letter, no other candidate for the judgeship had been announced. In addition to soliciting campaign contributions, the letter stated that the Respondent served the "community as Public Defender," though her correct title was "assistant public defender." The letter also included a link to the Respondent's website, which correctly referenced her work history as an assistant public defender.

The referee found "that the term public defender is widely used to refer to the specific attorney assigned to a case and not necessarily the elected public defender." A newspaper article published on November 3, 2009, included the Respondent's representation to a reporter that there was no incumbent in the judicial race for which the Respondent was running.

Before the referee, The Florida Bar alleged that the Respondent's campaign manager incorrectly posted on the Respondent's campaign website that the Respondent was "judge elect," even though the Respondent had never been a judge and had not been elected. The referee rejected the Bar's argument, finding "that the Respondent took reasonable action

in directing the campaign manager to obtain her approval prior to making any changes to her website." The referee also found that the Respondent "did not order, have knowledge of, or ratify the campaign manager's actions" regarding the posting of "judge elect."

Based upon the foregoing facts, the referee recommended that the Respondent be found guilty of violating Rules Regulating the Florida Bar 3-4.3 (Misconduct and minor misconduct), 4-8.2(b) (Judicial and Legal Officials, Candidates for Judicial Office; Code of Judicial Conduct Applies), and 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another). The referee recommended that the Respondent be found not guilty of violating rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants; Supervisory Responsibility), which the Bar alleged the Respondent had violated based on the campaign manager's inaccurate posting on the website.

Regarding the solicitation of campaign funds in her letter signed September 4, 2009, the referee rejected the Respondent's testimony that she understood Canon 7C(1) of the Code of Judicial Conduct would apply only if there were another candidate in the judicial race. Canon 7C(1) provides in pertinent part as follows: "A candidate . . . for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds. . . ." In finding that the Respondent violated Canon 7C(1), the referee stated that "[i]t is clear that the use of 'election between competing candidates' is used to describe the type of judicial office where the prohibition would apply."

In addressing the Respondent's statement to the newspaper reporter, the referee found that the Respondent misrepresented the fact that there was no incumbent in the judicial race for which she was running. Further, the referee found that the Respondent's misrepresentation was published in a newspaper article on November 3, 2009.

With respect to discipline, the referee considered the Respondent's personal history, finding that the Respondent was admitted to The Florida Bar in 1991 and does not have any prior disciplinary history. Additionally, the referee found no aggravating factors and found the following mitigating factors: absence of a prior disciplinary record; absence of a dishonest or selfish motive; timely good faith effort to make restitution or to rectify consequences of misconduct; and full and free disclosure to disciplinary board or cooperative attitude toward proceedings. The referee consequently recommended that the Respondent receive a public reprimand and awarded costs to The Florida Bar in the amount of $1,860.30.

ANALYSIS

The Respondent seeks review of the referee's factual finding that she made a misrepresentation to a reporter; the referee's recommendations of guilt as to rules 3-4.3, 4-8.2(b), and 4-8.4(a); and the referee's recommended discipline, which calls for a public reprimand and payment of costs to The Florida Bar.

This Court's standard of review for evaluating a referee's factual findings is limited, and if a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *See Fla. Bar v. Frederick*, 756 So.

2d 79, 86 (Fla. 2000). The Court has repeatedly stated that the referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt. *See Fla. Bar v. Shoureas*, 913 So. 2d 554, 557-58 (Fla. 2005).

Violation of Rule 4-8.2(b)

The Respondent first challenges the referee's recommendation that she be found guilty of violating rule 4-8.2(b) (Judicial and Legal Officials, Candidates for Judicial Office; Code of Judicial Conduct Applies). With respect to this rule violation, the Respondent does not challenge the referee's factual findings. Instead, the Respondent admits that she signed the letter soliciting campaign funds, but attempts to justify her misconduct by explaining that she signed the letter while under the impression that Canon 7C(1) did not apply to her since, at the time she signed the letter, there was no other candidate in the race.

The Respondent now understands that the prohibition against solicitation by a judicial candidate applied to her. Nevertheless, even though the Respondent admits that Canon 7C(1) applied to her, she asserts that the referee's recommendation of guilt is incorrect because Canon 7C(1) is unconstitutional in that it limits a judicial candidate's right to engage in free speech by prohibiting a judicial candidate from directly soliciting campaign contributions.

Canon 7C(1) provides in pertinent part as follows:

> A candidate . . . for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly

> stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law.

On its face, Canon 7C(1) prohibits a judicial candidate from personally soliciting campaign contributions.

This Court recognizes that by prohibiting judicial candidates from personally soliciting campaign contributions, Canon 7C(1) clearly restricts a judicial candidate's speech. Therefore, in order to be constitutional and not in violation of the First Amendment, Canon 7C(1) must be narrowly tailored to serve a compelling state interest. *See Firestone v. News-Press Publ'g Co.*, 538 So. 2d 457, 459 (Fla. 1989) ("Restrictions on first amendment rights must be supported by a compelling, governmental interest and must be narrowly drawn to insure that there is no more infringement than is necessary.").

As this Court has previously stated, Florida has "a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary." *In re Kinsey*, 842 So. 2d 77, 87 (Fla.2003) (citing In re Code of Judicial Conduct (Canons 1, 2, & 7A(1)(b)), 603 So. 2d 494, 497 (Fla. 1992)). Florida is certainly not alone in this regard. Other state supreme courts to address the constitutionality of judicial ethics canons comparable to Canon 7C(1) have held that similar State interests are compelling. *See Simes v. Ark. Judicial Discipline*

& Disability Comm'n, 368 Ark. 577, 247 S.W.3d 876, 881 (2007); *In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003); *In re Fadeley*, 310 Or. 548, 802 P.2d 31, 41 (1990).

Over twenty years ago, the Oregon Supreme Court, in upholding a judicial ethics canon similar to Florida's Canon 7C(1), stated that the compelling State interest served by the solicitation restriction

> is the state's interest in maintaining, not only the integrity of the judiciary, but also the appearance of that integrity. The persons most actively interested in judicial races, and the persons who are the most consistent contributors to judicial campaigns, are lawyers and potential litigants. The impression created when a lawyer or potential litigant, who may from time to time come before a particular judge, contributes to the campaign of that judge is always unfortunate. Although many or most lawyers may act with pure motives, viz., to ensure a qualified judiciary and to ensure vigorous public debate, the outside observer cannot but think that the lawyer or potential litigant either expects to get special treatment from the judge or, at the least, hopes to get such treatment. It follows that, if it is at all possible to do so, the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.

In re Fadeley, 802 P.2d at 41.

More recently, the Arkansas Supreme Court, in addressing the constitutionality of a judicial ethics

canon comparable to Canon 7C(1), echoed the concerns articulated by the Supreme Court of Oregon, holding that Arkansas' solicitation ban served two separate compelling State interests: (1) ensuring judicial impartiality, and (2) ensuring the public's trust and confidence in the integrity of the judicial system by avoiding the appearance of impropriety. *See Simes*, 247 S.W.3d at 881-82.

As to the first State interest, ensuring judicial impartiality, the Arkansas Supreme Court stated as follows:

> Certainly the state has a compelling interest in diminishing the possibility that judges, once in office, will be pressured to decide issues in favor of those who financially supported their campaign. Therefore, in addition to impartiality as it goes to bias, we conclude that the open-mindedness of judges is a sufficient compelling state interest.

Id. at 881.

With respect to the second compelling State interest, avoiding the appearance of impropriety, the Arkansas court explained as follows:

> The state certainly has a compelling interest in the public's trust and confidence in the integrity of our judicial system. Allowing a judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court, not only has the possibility of making a judge feel obligated to favor certain parties in a case, it inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate. Attorneys

> ought not feel pressured to support certain judicial candidates in order to represent their clients. In addition, the public should be protected from fearing that the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions.

Id. at 882. These decisions illustrate that other state supreme courts that have addressed the constitutionality of judicial ethics canons similar to Florida's Canon 7C(1) have reached the same conclusion that this Court reached in *In re Kinsey*, 842 So. 2d at 87—that protecting the integrity of the judiciary, as well as maintaining the public's confidence in an impartial judiciary, represent compelling State interests capable of withstanding constitutional scrutiny.

Therefore, in light of this Court's prior holding that Florida has a compelling interest in protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary—a holding that is bolstered by the broad acceptance of comparable compelling State interests by other state supreme courts—we conclude that Canon 7C(1), which furthers these goals, serves compelling State interests. The constitutionality of Canon 7C(1) thus turns on whether the Canon is narrowly tailored to serve these compelling State interests.

The United States Supreme Court has stated that a government regulation is narrowly tailored "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The Respondent contends that Canon 7C(1) fails to satisfy the nar-

rowly tailored requirement, particularly in the context of a mass mailing letter. We disagree.

First, the Respondent's argument ignores that this process includes a candidate's direct receipt of funds. Moreover, personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impartiality. Thus, "[t]o protect the independence of the judiciary, the right of judges to engage in political activity has been restricted." *In re Code of Judicial Conduct (Canons 1, 2, & 7A(1)(b))*, 603 So. 2d at 497.

Canon 7C(1), which contains provisions similar to Canons 4.1(A)(8) and 4.4 of the American Bar Association Model Code of Judicial Conduct,[1] is de-

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[1] Canon 4.1 of the American Bar Association Model Code of Judicial Conduct states in pertinent part: "[e]xcept as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not: . . . personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4." A.B.A. Model Code of Judicial Conduct, Canon 4.1(A)(8).

> Further, Canon 4.4, which governs the use of campaign committees, states as follows:
>
> (A) A judicial candidate subject to public election may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.
>
> (B) A judicial candidate subject to public election shall direct his or her campaign committee:
>
> (1) to solicit and accept only such campaign contributions as are reasonable, in any event not to exceed, in the aggregate, $[insert amount]

signed to insulate judges from directly engaging in fundraising activity by allowing the establishment of campaign committees, through which judges can raise campaign funds without direct participation. A majority of states have enacted similar provisions.[2]

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from any individual or $[insert amount] from any entity or organization;

(2) not to solicit or accept contributions for a candidate's current campaign more than [insert amount of time] before the applicable primary election, caucus, or general or retention election, nor more than [insert number] days after the last election in which the candidate participated; and

(3) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions, and to file with [name of appropriate regulatory authority] a report stating the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding $[insert amount]. The report must be filed within [insert number] days following an election, or within such other period as is provided by law.

A.B.A. Model Code of Judicial Conduct, Canon 4.4.

[2] With respect to judicial races involving either an opposed election or retention with active opposition, the majority of states require that the solicitation for judicial campaign funds be conducted through a campaign committee. See, e.g., Alaska Code of Jud. Conduct, Canon 5C(3); Ariz.Code of Jud. Conduct, Canon 4, R. 4.1(A)(6); Ark.Code of Jud. Conduct, Canon 4, R. 4.2(B)(1); Colo.Code of Jud. Conduct, Canon 4, R. 4.3(A); Conn.Code of Jud. Conduct, Canon 5A(4); Idaho Code of Jud. Conduct, Canon 5C(2); Ill.Code of Jud. Conduct, Canon 7B(2); Ind.Code of Jud. Conduct, Canon 4, R. 4.4(A); Iowa Code of Jud. Conduct, Canon 4, R. 51:4.4(A); Ky.Code of Jud. Conduct, Canon 5B(2); La.Code of Jud. Conduct, Canon 7C(2)(b); Me.Code of Jud. Conduct, Canon 5C(3); Mich.Code of Jud. Conduct, Canon

Further, every state supreme court that has examined the constitutionality of comparable state judicial ethics canons has concluded that these types of provisions are constitutional, as one of a constellation of provisions designed to ensure that judges engaged in campaign activities are able to maintain their status as fair and impartial arbiters of the law. *See Simes*, 247 S.W.3d at 884; *In re Dunleavy*, 838 A.2d at 351; *In re Fadeley*, 802 P.2d at 44.[3] One such state is Oregon, which, like Florida, requires judicial candidates to establish and raise money through

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7B(2)(b); Minn.Code of Jud. Conduct, Canon 4, R. 4.4(A); Miss.Code of Jud. Conduct, Canon 5C(2); Mo.Code of Jud. Conduct, Canon 4, R. 2-4.2(B); Mont.Code of Jud. Conduct, Canon 4, R. 4.4(A); Neb.Code of Jud. Conduct, Canon 4, R. 5-304.1(A)(8); N.M.Code of Jud. Conduct, Canon 4, R. 21-404A; N.Y.Code of Jud. Conduct, Canon 5(A)(5); N.D.Code of Jud. Conduct, Canon 4, R. 4.6; Ohio Code of Jud. Conduct, Canon 4, R. 4.4(A); Okla. Code of Jud. Conduct, Canon 4, R. 4.4(A); Or.Code of Jud. Conduct, R. 4-102(D); Pa.Code of Jud. Conduct, Canon 7B(2); S.C.Code of Jud. Conduct, Canon 5C(2); Tenn.Code of Jud. Conduct, Canon 4, R. 4.4; Utah Code of Jud. Conduct, Canon 4, R. 4.2(B)(2); Vt.Code of Jud. Conduct, Canon 5C(3); Wash.Code of Jud. Conduct, Canon 4, R. 4.4; W. Va.Code of Jud. Conduct, Canon 5C(2); Wis.Code of Jud. Conduct, R. 60.06(4); Wyo.Code of Jud. Conduct, Canon 4, R. 4.2(B)(4).

[3] As to the federal courts that have considered this issue—whose judges have lifetime appointments and thus do not have to engage in fundraising—the federal courts are split. Several federal courts have held that laws similar to Canon 7C(1) are constitutional. *See Wersal v. Sexton*, 674 F.3d 1010 (8th Cir. 2012); *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010); *Stretton v. Disciplinary Bd. of S.Ct. of Pa.*, 944 F.2d 137 (3d Cir. 1991). Conversely, other federal courts have held that laws similar to Canon 7C(1) are unconstitutional. *See Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

campaign committees rather than allowing direct solicitation.

In addressing the constitutionality of Oregon's judicial canon, the Oregon Supreme Court reviewed why campaign committees are necessary, explaining as follows:

> So long as judges are chosen by the electoral process, it will be impossible to deny lawyers and potential litigants the right to give to campaigns or to deny judges the right to seek contributions. Both activities are too important in the scheme of things to permit either to be forbidden outright. Some other, less intrusive method is needed.
>
> [The canon] is that method. It permits the judge to obtain funds to carry out a campaign but eliminates the specter of contributions going from the hand of the contributor to the hand of the judge. The limitation on the ability to raise funds need not cause the campaign to suffer, if the judge picks good people for his or her campaign finance committee. It is true that the committee, however well suited to the task, may have trouble obtaining as much as the judge might have raised by personal buttonholing, but that is the point.

In re Fadeley, 802 P.2d at 41 (citations omitted). In addressing whether the canon was narrowly tailored, the Oregon Supreme Court explained that its canon did not sweep too broadly because under the Oregon Code of Judicial Conduct, "[s]olicitation of funds by a surrogate of the judge's choice is permissible; only

personal solicitation by the judge is foreclosed." *Id.* at 44.

The same reasoning applies in this case. Under Canon 7C(1), the Respondent was not completely barred from soliciting campaign funds, but was simply required to utilize a separate campaign committee to engage in the task of fundraising. In other words, Canon 7C(1) is narrowly tailored because it seeks to "insulate judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns." *Simes*, 247 S.W.3d at 883.

We conclude that Canon 7C(1) promotes the State's compelling interests in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary, and that it is narrowly tailored to effectuate those interests. Therefore, we hold that Canon 7C(1) is constitutional, and we approve the referee's recommendation that the Respondent be found guilty of violating rule 4-8.2(b).

Violation of Rules 3-4.3 and 4-8.4(a)

Next, the referee recommended that the Respondent be found guilty of violating rules 3-4.3 and 4-8.4(a) for making a misrepresentation to a reporter. We conclude that this recommendation is not supported by competent, substantial evidence in the record. *See Frederick*, 756 So. 2d at 86.

At issue is the following sentence included in a newspaper article published on November 3, 2009: "On Tuesday, [Respondent] Williams-Yulee told a Times reporter there was no incumbent for the position she's seeking, though County Judge Dick Greco, Jr. currently holds it." The Bar did not present the

reporter's testimony at the hearing, and the Respondent testified that she had told the reporter that there was an incumbent but that he had not announced his candidacy. We conclude that the statement from the newspaper article, standing alone, is insufficient evidence to support the referee's recommendation as to guilt and, therefore, we disapprove the referee's recommendation with respect to rules 3-4.3 and 4-8.4(a).

Discipline

The Respondent also seeks review of the referee's recommended discipline, which calls for the Respondent to receive a public reprimand. The Respondent argues that she should not be sanctioned because she did not violate the Bar rules. In contrast, the Bar argues that the referee recommended the appropriate sanction in this case.

In reviewing a referee's recommended discipline, this Court's scope of review is broader than that used to review the referee's findings of fact because, ultimately, it is this Court's responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989); *see also* art. V, § 15, Fla. Const. At the same time, however, this Court will generally not second-guess the referee's recommended discipline, as long as the recommended discipline has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer*, 753 So. 2d 555, 558 (Fla. 1999).

The referee found that the Respondent's conduct was negligent, as opposed to being intentional. Thus, standards that address negligence apply to this case.

Standards 6.13[4] and 7.3,[5] which both pertain to public reprimands, support the referee's recommendation.

In addition, case law indicates that this Court has imposed a public reprimand in circumstances where the misconduct is neither continuous nor involves an intentional pattern of deceit. *Compare Fla. Bar v. Cocalis*, 959 So. 2d 163, 167-68 (Fla. 2007) (concluding that the respondent's isolated misconduct warranted only a public reprimand), *with Fla. Bar v. Miller*, 863 So. 2d 231, 235 (Fla. 2003) (concluding that the respondent's continuous and intentional pattern of deceit was more egregious than the circumstances under which the Court has approved a public reprimand), *and Fla. Bar v. Forrester*, 818 So. 2d 477, 484 (Fla. 2002) (concluding that the respondent's conduct did not involve an isolated instance of neglect or a lapse in judgment warranting a public reprimand, but instead involved intentionally concealing an exhibit and misrepresenting its whereabouts). This Court has also imposed a public reprimand where there is an absence of prior misconduct. *See, e.g., Cocalis*, 959 So. 2d at 168 (noting that the respondent had "no previous disciplinary record"); *Fla. Bar v. Shannon*, 398 So. 2d 453, 454 (Fla.1981)

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[4] Florida Standard for Imposing Lawyer Sanctions 6.13 states in pertinent part that "[p]ublic reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false. . . ."

[5] Florida Standard for Imposing Lawyer Sanctions 7.3 provides in part that "[p]ublic reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to . . . the public, or the legal system."

(stating that the "Respondent has no record of past professional misconduct").

Moreover, the referee found no aggravating factors and four mitigating factors: absence of a prior disciplinary record; absence of a dishonest or selfish motive; timely good faith effort to make restitution or to rectify consequences of misconduct; and full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Based upon the facts in this case, the standards, and established case law, we conclude that the referee's recommended sanction of a public reprimand is appropriate.

CONCLUSION

Accordingly, we approve the referee's findings of fact and recommendation of guilt with respect to rule 4-8.2(b), disapprove the referee's findings of fact and recommendation of guilt with respect to rules 3-4.3 and 4-8.4(a), and approve the referee's recommended discipline. By publication of this opinion, Lanell Williams-Yulee is hereby publicly reprimanded.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Lanell Williams-Yulee in the amount of $1,860.30, for which sum let execution issue.

It is so ordered.

PARIENTE, LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.

POLSTON, C.J., and CANADY, J., concur in part and dissent in part.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, ***Complainant,*** **v.** **LANELL WILLIAMS-YULEE,** ***Respondent.***	**Case No. SC11-265** **TFB File No. 2010-10,624(6A)**

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On February 8, 2011, The Florida Bar filed its Complaint against the Respondent. On June 20, 2011, the Referee's Motion to Stay Proceedings was granted and on February 3, 2012 the Referee's Motion to Lift Stay was granted. On March 2, 2012, the Respondent's Motion to Determine Sufficiency of Complaint was heard and an order was entered on March 19, 2012 finding sufficiency to proceed. On April 13, 20112, a final hearing was held in this matter and on April 24, 2012 an Order gin Recommendation of Guilt. On May 11, 2012 a hearing was held on the issue of sanctions. All of the aforementioned

pleadings, responses thereto, exhibits received into evidence and this Report constitute the record in this c4se and are forwarded to the Supreme Court of Florida.

The following attorneys appeared as counsel for he parties:

For The Florida Bar: Jodi A. Thompson

For Respondent: Ernest Myers

Respondent participated fully in this proceeding.

II. FINDINGS OF FACT

A. Jurisdictional Statement. The Respondent is, and at all times mentioned during the investigation was a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative of the Case.

On or about September 2009, the Respondent became a candidate for County Court Judge, Group 10, Hillsborough bounty, Florida. On September 4, 2009, the Respondent signed a campaign fundraising letter wherein the Respondent personally solicited campaign contributions. The Respondent admitted that she reviewed and approved the September 4, 2009 letter. The Respondent testified that prior to approving the letter she reviewed Canon 7C(1) of the Code of Judicial Conduct regarding solicitation of funds. However, the Respondent testified that she interpreted the Canon to only apply if there was another candidate in the race. At the time the solicitation letter was sent no other candidate had been announced. Canon 7C(1) states that the prohibition of personal solicitation of campaign funds apply to any candidate for "judicial office that is filled by public election be-

tween competing candidates." It is clear that the use of "election between competing candidates" is used to describe the type of judicial office where the prohibition would apply.

The Respondent misrepresented to a newspaper reporter that there was no incumbent in the judicial race for which she was running. An article published November 3, 2009 refers to the misrepresentation by the Respondent. I note that the Respondent raised for the first time at the sanctions hearing, subsequent to the Order on Recommendation of Guilt, the issue of the reporter not testifying to the statements that were made by the Respondent. The Respondent argued that without the testimony of the reporter, The Florida Bar did not meet its burden. The November 3, 2009 article was admitted into evidence. I do not feel it is appropriate to address this claim at this time since the argument was raised in the closing comments during the sanction proceeding and the Florida Bar did not have an opportunity to respond.

The Florida Bar alleged that in a September 4, 2009 letter, the Respondent stated she served the "community as Public Defender" and not an assistant public defender, which was her correct title. I find that the term public defender is widely used to refer to the specific attorney assigned to a case and not necessarily the elected public defender. Based on this common use of the term public defender it is not likely that the public would be misled by its use in this case. Additionally, the letter contained a link to the Respondent's website which contained a correct reference to her work history as an assistant public defender. I find this conduct is not a violation of the Rules.

Finally, it was alleged that the Respondent's campaign manager incorrectly posted that the Respondent was "judge elect" when she had not never been a judge and had not been elected. I find that the Respondent took reasonable action in directing the campaign manager to obtain her approval prior to making any changes to her website. Pursuant to Rule 4-5.3(b), a lawyer may be held responsible for the conduct of a On-lawyer's actions if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved. The Respondent did not order, have knowledge of, or ratify the campaign manager's action. I find this conduct is not a violation of the Rules.

III. RECOMMENDATION AS TO GUILT

It is recommended that the Respondent be found **GUILTY** of violating Rule 3-4.3 (Misconduct and Minor Misconduct); Rule 4-8.2(b) (Judicial and Legal Officials; Candidates for Judicial Office; Code of Judicial Conduct Applies); and Rule 4-8.4(a) (Misconduct-a lawyer shall not violated or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another). It is recommended that the Respondent be found **NOT GUILTY** of violating Rule 4-5.3(b) (Responsibilities Regarding Non-lawyer Assistants; Supervisory Responsibility).

IV. AGGRAVATING AND MITIGATING FACTORS

Aggravating Factor:	None
Mitigating Factors:	9.32(a) (absence of a prior disciplinary record);
	9.32(b) (absence of a dishonest or selfish motive) —

(The parties agree that the misconduct was not calculated to benefit Respondent personally.);

9.32(d) timely good faith effort to make restitution or to rectify misconduct;

9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

V. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that the Respondent be found guilty of misconduct justifying disciplinary measure, and that she be disciplined by:

A. Public Reprimand.

I note that the Respondent argued that she: has already received punishment due to the various negative articles written about her actions in the 2009 campaign and that there was no actual harm to the public. However, the Respondent's actions may have caused harm to the public's faith in the judicial election process. I also note that the Respondent testified that she assured her clients who called with concerns due to the recent newspaper article about the instant proceedings that there would be no problems with her representation and nothing was going on. I do not see how the Respondent could make such assurance with the instant proceedings and possible sanctions still pending. The Respondent also testified that she is currently running as a judicial candidate once again while these proceedings are still pending.

B. Payment of The Florida Bar's costs in these proceedings.

VI. Personal History and Past Disciplinary Record:

Prior to recommending discipline pursuant t4 Rule 3-7.6(m)(l), I considered the following:

A. Personal History of Respondent:

Age: 48

Date Admitted to Bar: April 24, 1991

Prior Discipline: None

B. Aggravating Factors: None

C. Mitigating Factors: 9.32(a) (absence of a prior disciplinary record);

9.32(b) (absence of dishonest or selfish motive) — (The parties agree that the misconduct was not calculated to benefit Respondent personally.);

9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

VI. Costs: I find the following costs were reasonably incurred by The Florida Bar:

Administrative costs pursuant to Rule 3-7.6(q)(1)(I)	$1,250.00
Florida Bar Counsel Costs	$15.30
Court Reporter Costs	$595.00
Clark Reporting Service	
TOTAL	$1860.30

I recommended that the foregoing itemized costs be charged to the Respondent and that interest at the statutory rate accrue and become payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 12 day of June, 2012.

/s/

Honorable Chris Helinger, Referee
Sixth Judicial Circuit
14250 49th Street North
Clearwater, Florida 33762

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, ***Complainant,*** **v.** **LANELL WILLIAMS-YULEE,** ***Respondent.***	**Case No. SC11-265** **TFB File No. 2010-10,624(6A)**

ORDER ON RECOMMENDATION OF GUILT

THIS CAUSE came before this Referee pursuant to an order issued by the Supreme Court of Florida, dated February 21, 2011, and a subsequent administrative order issued by Chief Judge J. Thomas McGrady, dated March 1, 2011, the latter of which appointed the undersigned judge to act as referee in the above-styled matter. An evidentiary hearing occurred on April 13, 2012 where testimony and arguments were heard. Following consideration of the pleadings, evidence, and argument, this Referee finds as follows:

The Florida Bar argues that the Respondent violated various Rules Regulating the Florida Bar based upon four acts. At the conclusion of the submission of evidence, the Respondent moved for a diversion of the disciplinary action to a practice and professionalism enhancement program as authorized in Rule 3-5.3(h)(2), Rules Regulating The Florida Bar. The

Rules allow for a diversion if the conduct alleged to have been committed is not more serious than minor misconduct. This Referee cannot find that a violation of the Judicial Canons regarding the election process would ever be a minor misconduct. Therefore, the Respondent's motion for a diversion to a practice and professionalism enhancement program is **DENIED**.

The Florida Bar and the Respondent each presented one witness, the Respondent, Lanell Williams-Yulee. Each act that is the basis for the violations shall be address individually below.

1. ***The Respondent signed a campaign letter personally soliciting campaign contributions.***

The Florida Bar alleges that on or about September 2009, the Respondent became a candidate for County Court Judge, Group 10, Hillsborough County, Florida. On September 4, 2009, the Respondent signed a campaign fundraising letter wherein the Respondent personally solicited campaign contributions. The Respondent admits that she reviewed and approved the September 4, 2009 letter. The Respondent further testified that prior to approving the letter she reviewed Canon 7C(1) of the Code of Judicial Conduct regarding solicitation of funds. However, the Respondent testified that she interpreted the Canon to only apply if there was another candidate in the race. At the time the solicitation letter was sent no other candidate had been announced. Canon 7C(1) states that the prohibition of personal solicitation of campaign funds apply to any candidate for "judicial office that is filled by public election between competing candidates." It is clear that the use of "election between competing candidates" is used to describe the type of judicial office where the prohibi-

tion would apply. Based on Respondent's testimony this Referee does not doubt that the Respondent violated the Canon based on an ignorance of the meaning of the Canon; however, no matter the reason for violation, the Respondent violated Rule 4-8.2(b), which requires attorneys running for judicial office to comply with the applicable provision of the Florida Code of Judicial Conduct. A finding of GUILT is recommended on this violation.

2. ***The Respondent made a misrepresentation to the press that there was no incumbent for the judicial seat for which she was running.***

The Florida Bar alleges that the Respondent misrepresented to a reporter that there was no incumbent in the judicial seat for which she was running when in fact it was occupied by a judge who had not announced his candidacy. The Respondent argues that at the time she spoke with the reporter the sitting judge had not announced his candidacy for the race; however, this is irrelevant because the fact that there was a sitting judge in that seat meant there was an incumbent even though his candidacy had not been announced. A finding of GUILT is recommended on this violation.

3. ***The Respondent indicated on a campaign letter that she had served as "Public Defender" rather than assistant public defender.***

In the September 4, 2009 letter, the Respondent stated she served the "community as Public Defender." The Bar alleges this was a misrepresentation and was misleading because it might cause people to believe the Respondent was the elected public de-

fender and not an assistant public defender. The Respondent presented several news articles, attorney advertisements, as well as a rule and a Florida case where the assistant public defender was referred to as a public defender. The term public defender is widely used to refer to the specific attorney assigned to a case and not necessarily the elected public defender. Based on this common use of the term public defender it is not likely that the public would be misled by its use in this case. Additionally, the letter contained a link to the Respondent's website which contained a correct reference to her work history as an assistant public defender. A finding of **NO GUILT** is recommended on this violation.

4. ***The Respondent's campaign manager posted information on the Respondent's website incorrectly referring to her as "judge-elect."***

The Florida Bar alleges Respondent failed to properly supervise her campaign manager who incorrectly posted that she was "judge elect" when she had not never been a judge and had not been elected. The Respondent testified that she directed her campaign manager to seek approval for any changes to the website; however, without her knowledge or approval the campaign manager posted the term "judge elect" to refer to the Respondent. The Respondent was notified by a reporter of the webpage posting of the incorrect term and the Respondent took action to have it removed within an hour. The Respondent took reasonable action in directing the campaign manager to obtain her approval prior to making any changes to her website. Pursuant to Rule 4-5.3(b), a lawyer may be held responsible for the conduct of a non-lawyer's actions if the lawyer orders or, with the

knowledge of the specific conduct, ratifies the conduct involved. The Respondent did not order, have knowledge of, or ratify the campaign manager's action. A finding of **NO GUILT** is recommended on this violation.

RULES VIOLATED

As discussed above it is this Referee's recommendation that two of the four acts above constitute the basis of violations of the Rules Regulating the Florida Bar. Based on the findings above and a standard of clear and convincing evidence, it is recommended that the Respondent be found guilty of violating Rule 3-4.3 (Misconduct and Minor Misconduct); Rule 4-8.2(b) (Judicial and Legal Officials; Candidates for Judicial Office; Code of Judicial Conduct Applies); and Rule 4-8.4(a) (Misconduct-a lawyer shall not violated or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another).

Dated this 24 day of April 2012.

/s/

Honorable Chris Helinger, Referee
Sixth Judicial Circuit
14250 49th Street North
Clearwater, Florida 33762

APPENDIX D

LANELL WILLIAMS-YULEE

Reply to Tampa Post Office Box 340031
Tampa, Florida 33694
email: lwilliams94@verizon.net
www.vote4vulee.com

"Bringing Diversity to the Judicial Bench"

RE: Elect Lanell Williams-Yulee For County Court Judge Group 10 and Campaign Fundraiser

Dear Friend:

I have served as a public servant for this community as Public Defender as well as a Prosecutor for the past 18 years. Having been involved in various civic activities such as "The Great American Teach In," Inns Of Court, Pro Bono Attorney, Metropolitan Ministries outreach program, as well as a mentor for various young men and women residing within Hillsborough County, I have long worked for positive change in Tampa. With the support of my family, I now feel that the time has come for me to seek elected office. I want to bring fresh ideas and positive solutions to the Judicial bench. I am certain that I can uphold the Laws, Statutes, Ordinances as prescribed by the Constitution Of the State Of Florida as well as the Constitution of the United States Of America.

I am confident that I can serve as a positive attribute to the Thirteenth Judicial Circuit by running for County Court Judge, Group 10. To succeed in this effort, I need to mount an aggressive campaign. I'm inviting the people that know me best to join my

campaign and help make a real difference. An early contribution of $25, $50, $100, $250, or $500, made payable to "Lanell Williams-Yulee Campaign for County Judge", will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support In meeting the primary election fund raiser goals. Thank you in advance for your support.

Sincerely,

/s/_____

Lanell Williams-Yulee, Esq.

Political Advertisement paid for and approved by Lanell Williams-Yulee, Nonpartisan, for County Judge, Group 10

OPPOSITION BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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THE FLORIDA BAR'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Florida Bar submits that the Florida Supreme Court correctly determined that the challenged Canon 7C(1) of the Florida Code of Judicial Conduct complies with the First Amendment. However, The Florida Bar believes that this Court should issue its writ of certiorari to resolve the significant conflicts existing between state high courts and federal circuit courts and among federal circuit courts on this fundamental issue of constitutional rights.

The Petitioner accurately summarizes the current state of the law in which three state high courts and two federal circuit courts have held Florida's rule and materially equivalent rules in five other states to be constitutional and four federal circuits have held equivalent rules to be unconstitutional.

In addition to the conflict-driven justifications set forth by the Petitioner for this Court to grant the writ, The Florida Bar adds the following considerations:

I. The issues at the heart of the conflicts are not such that they can accommodate different interpretations and applications in different jurisdictions and judicial forums without insulting fundamental principles. In this instance, the conflicts deal with the proper balance between two compelling interests at the heart of a free and just society. The manner in which that balance is struck should be applied uniformly to all citizens in all places and before all tribunals.

II. Judicial conflicts over the issues raised by the petition are likely to increase in the foreseeable future. Over twenty states that provide for popular election of judges have rules similar to Canon 7C(1). It is reasonable to assume that federal and state courts, or both, will be called upon to adjudicate the constitutionality of those rules.

It is a virtual certainty that the existing and anticipated future conflicts will not be resolved without the intervention of this Court. A number of the courts that have adjudicated the issue have recognized the existence of conflicting state and federal decisions, but none have shown any inclination to be persuaded by those decisions. In fact, the existence of the conflicts appears to be a disincentive to resolution. In *Bauer v. Sheppard*, 620 F.3d 704 (7th Cir. 2010), the Seventh Circuit, after recognizing that its decision upholding the constitutionality of a personal solicitation rule similar to Canon 7C(1) was in conflict with decisions of the Eighth and Eleventh Circuits, concluded, "Nothing we can do here could create harmony among the circuits, so there is no reason to depart from the approach taken so recently in this circuit." 620 F.3d at 710.

III. The Florida Bar joins the Petitioner in respectfully urging this Court to accept this case for review not only because there is a national need for resolution, but because of the particularly troublesome position in which it places The Florida Bar. Denial of the petition for certiorari would leave the decision of the Florida Supreme Court standing, but would provide The Florida Bar with little comfort. The existing indirect conflict between the decision of the Florida Supreme Court, and the decision of the Eleventh Circuit in *Weaver v. Bonner*, 309 F.3d

1312 (11th Cir. 2002), a case involving a Georgia judicial candidate, is likely to become a direct conflict when the Eleventh Circuit is inevitably called upon to adjudicate the constitutionality of Canon 7C(1) in a case involving a Florida judicial candidate. There should be no doubt, however, that The Florida Bar believes that the correct constitutional analyses are those announced by the Third and Seventh Circuits and the Florida, Arkansas and Oregon high courts, and that The Florida Bar will vigorously argue that position in the event that this case reaches the merits. A case and controversy exists and will continue to exist in this matter.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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REPLY BRIEF

No. 13-1499

In the Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Canon 7C(1) of Florida Code of Judicial Conduct prohibits a candidate for elected judicial office from personally soliciting campaign contributions. The Florida Supreme Court held in a divided decision that Canon 7C(1) survives strict scrutiny under the First Amendment to the U.S. Constitution. As we demonstrated in the petition, that decision merits further review because it implicates an intractable conflict among the lower courts on a constitutional question of substantial practical importance, in a case that cleanly presents the issue.

Respondent agrees, "urging this Court to accept this case for review." Resp. Br. 2. Respondent recognizes (*id.* at 1) that the petition "accurately summarizes" the conflict among the lower courts. And because "[o]ver twenty states that provide for popular election of judges have rules similar to Canon 7C(1)," respondent continues, there is no dispute that the issue is frequently recurring and that "[j]udicial conflicts over the issues raised by the petition are likely to increase in the foreseeable future." *Id.* at 2. Against this background, "[i]t is a virtual certainty" that the conflict identified in the petition "will not be resolved without the intervention of this Court." *Ibid.*

Respondent further observes (Br. 2) that the Florida Supreme Court's decision in this case, although favorable to it on the merits, offers it "little comfort" because, if petitioner's challenge to Canon 7C(1) had been litigated in federal court instead, the canon would have been invalidated under the Eleventh Circuit's conflicting decision in *Weaver* v. *Bonner*, 309 F.3d 1312 (11th Cir. 2002). Indeed, the

conflict between the Florida high court and the Eleventh Circuit leaves open the possibility that petitioner herself could file a Section 1983 suit seeking a federal-court injunction against enforcement of the state sanctions imposed in the proceedings below. That would be an especially untoward result.

It also is notable that respondent does not dispute any aspect of our statement of the case. See S. Ct. Rule 15.2. The facts presented here are, in other words, as uncontested as they are straightforward.

Typically, a respondent joins in a petitioner's request for further review only when "there is a clear conflict of decisions" and "the question is undoubtedly of such importance as to need a Supreme Court determination." Stephen M. Shapiro, et al., *Supreme Court Practice* 510 (10th ed. 2013).[1] That is precisely the case here. Because this case offers an opportunity to answer the question presented free of any doubt that the controversy here is both ripe and ongoing (see Pet. 15-16 & n.9; Resp. Br. 3), the petition for a writ of certiorari should be granted.

---

[1] See, *e.g.*, Br. for Resp. at 7, *Mach Mining, LLC* v. *EEOC*, No. 13-1019 (May 27, 2014) (respondent "agree[d]" that "this Court's review is necessary to provide guidance" in a case "present[ing] a recurring question of substantial importance"), cert. granted, 134 S. Ct. 2872 (2014) (Mem.); Br. for Resp. at 18, *Am. Broad. Co., Inc.* v. *Aereo, Inc.*, No. 13-461 (Dec. 12, 2013) (respondent agreed "that the Court should grant the petition to resolve [an] important issue of federal law"), cert. granted, 134 S. Ct. 896 (2014) (Mem.); Br. for NFL Resp. at 4, *Am. Needle, Inc.* v. *Nat'l Football League*, No. 08-661 (Jan. 21, 2009) (respondent "t[ook] the unusual step of supporting certiorari" in case involving a conceded circuit conflict), cert. granted, 557 U.S. 933 (2009) (Mem.).

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AUGUST 2014

PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Florida (Pet. App. 1a-18a) is reported at 138 So. 3d 379. The referee's report (Pet. App. 19a-25a) and order on recommendation of guilt (Pet. App. 26a-30a) are not reported.

JURISDICTION

The final judgment of the Supreme Court of Florida was entered on May 1, 2014. The petition for a writ of certiorari was filed on June 17, 2014, and was granted on October 2, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1257.

RULE INVOLVED

Canon 7C(1) of the Florida Code of Judicial Conduct provides, in relevant part:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy.

STATEMENT

Whether state court judges should be chosen through election or appointment is the subject of vigorous debate in our country. Under our Constitution, "States are free to choose [elections] rather than * * * appointment and confirmation" as the method that

will "select those persons likely to achieve judicial excellence." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 795 (2002) (*White I*) (Kennedy, J., concurring). But "[t]he State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech." *Ibid.*

That is precisely what Florida has done here—providing for judicial elections but imposing an across-the-board prohibition on candidate speech requesting campaign contributions. Florida's prohibition applies even if the request is through mass mailing of a letter signed by the candidate, or a request posted on a campaign website.

That content-based limitation of core campaign speech cannot withstand strict scrutiny review. Florida's asserted interests in preventing corruption and bias are undermined by the limited nature of its prohibition—although Canon 7C(1) prevents a judicial candidate from soliciting donations, the candidate may nonetheless learn the identities of those who have—and have not—donated to her campaign. The candidate may even write thank-you notes to donors. Canon 7C(1)'s regulation of candidate speech at most creates an illusion of separation between candidate and contributor, which in turn undermines any claim of compelling interest.

Moreover, the State has other means of preventing bias that do not limit protected speech. Judicial recusal is the appropriate remedy for addressing the risk of bias. And limits on campaign contributions serve to preserve impartiality and prevent bias. The availability of those less restrictive alternatives dooms Florida's across-the-board speech ban.

"Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, * * * the cost of campaigning requires judicial candidates to engage in fundraising." *White I*, 536 U.S. at 789-790 (O'Connor, J., concurring). Florida's choice of popular election as a means of choosing particular categories of judges, combined with the availability of alternative means for addressing the risk of judicial bias, require the invalidation under the First Amendment of Canon 7C(1)'s regulation of candidate speech.

A. Legal Background.

Florida's Constitution provides that judges serving on circuit courts and county courts—the State's general-jurisdiction trial courts—shall be selected by election unless the voters of a particular circuit or county choose by referendum to adopt the alternative system of appointment by the Governor followed by retention elections. Fla. Const. art. V, sec. 10(b). Elections to select judges and to retain judges chosen by appointment are conducted on a nonpartisan basis. Fla. Stat. §§ 105.071, 105.09.

State laws governing reporting and disclosure of campaign contributions and imposing limits on contributions to candidate committees apply to judicial candidates. Fla. Stat. §§ 106.011(3) (definition of "candidate"), 106.021 (appointment of campaign treasurer), 106.06 (record requirements), 106.08(1)(a) (contribution limits).

Judicial candidates' election activities are also regulated by Canon 7 of Florida's Code of Judicial Conduct. That canon provides in pertinent part that candidates "for a judicial office that is filled by public election between competing candidates"—including

incumbent judges—"shall not personally solicit campaign funds, or solicit attorneys for publicly stated support." Fla. Code of Jud. Conduct, Canon 7C(1). Candidates may "establish committees of responsible persons to secure and manage the expenditure of funds" for their campaigns and to solicit support. "Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law." *Ibid.*

A judge in a retention election is subject to Canon 7C(1)'s restrictions only until he or she certifies to Florida's secretary of state and judicial qualifications commission "that the judge's candidacy has drawn active opposition, and specifying the nature thereof." Fla. Code of Jud. Conduct, Canon 7C(2). Following that certification, the general restrictions on soliciting campaign funds and public support no longer apply. *Ibid.* However, a Florida Judicial Ethics Advisory Committee Opinion indicates that even solicitation activities not prohibited by Canon 7 could violate the general requirement that "a candidate for a judicial office shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary." Opinion 2004-07 (Fla. Jud. Eth. Adv. Comm. 2004).[1]

B. Factual Background.

Petitioner stood as a candidate for County Court Judge in Hillsborough County, Florida, which in-

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[1] The Committee "render[s] written advisory opinions to inquiring judges concerning the propriety of contemplated judicial and non-judicial conduct." *Petition of the Comm. on Standards of Conduct Governing Judges*, 698 So. 2d 834, 835 app. (Fla. 1997). Those advisory opinions are available at http://perma.cc/-5ACT-SY9V, and many are available on Westlaw.

cludes the city of Tampa. Pet. App. 3a. On September 4, 2009, she signed a mass-mail campaign fundraising letter in which she announced her candidacy and requested campaign contributions. *Id.* at 27a, 31a-32a. The letter explained that "[a]n early contribution of $25, $50, $100, $250, or $500, made payable to 'Lanell Williams-Yulee Campaign for County Judge', will help raise the initial funds needed to launch the campaign and get our message out to the public." *Id.* at 32a. The letter concluded with petitioner's signature. *Ibid.*

The letter was mailed to a number of individual voters and was posted on the website maintained by petitioner's campaign committee. Hearing Tr. 19-20 (Apr. 13, 2012). At the time petitioner signed the letter, there were no other announced candidates for the judgeship. Pet. App. 3a.

C. Proceedings Below.

Respondent filed a complaint against petitioner in the Supreme Court of Florida, alleging (so far as relevant here) a violation of Canon 7C(1) of the Florida Code of Judicial Conduct. Pet. App. 2a.

1. The matter was referred to a referee (akin to a magistrate), who recommended a finding of guilt. Pet. App. 19a-30a. Observing that Canon 7C(1) applies by its terms only to elections "between competing candidates," petitioner testified that she had read the canon as not applying to candidates in uncontested races. *Id.* at 27a. But the referee rejected that interpretation, holding that the words "between competing candidates" are "used to describe the *type* of judicial office where the prohibition would apply," and not the case-by-case circumstances of any particular race. *Id.* at 27a-28a (emphasis added). Thus,

while finding that petitioner's violation of the canon was based on a good faith mistake as to its meaning, the referee recommended a finding of guilt because "the reason for violation" is irrelevant. *Id.* at 28a.

With respect to discipline, the referee found that petitioner had no prior disciplinary history; had no dishonest or selfish motive; made a timely and good faith effort to rectify her misconduct; and was fully cooperative with the disciplinary board. Pet. App. 24a. The referee accordingly recommended that petitioner receive a public reprimand and pay the costs of the proceedings. *Id.* at 23a-24a.

2. The Florida Supreme Court approved the referee's findings of fact and recommended determination of guilt "for personally soliciting campaign contributions in violation of Canon 7C(1) of the Florida Code of Judicial Conduct." Pet. App. 1a.[2] The court rejected petitioner's contention that the imposition of sanctions violated the First Amendment.

The Florida court began its analysis by acknowledging that, because "Canon 7C(1) clearly restricts a judicial candidate's speech," it "must be narrowly tailored to serve a compelling state interest." Pet. App. 7a. But the court held that "Florida has 'a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary,'" observing that "other state supreme courts that have addressed the constitutionality of judicial ethics canons similar to Florida's Canon 7C(1) have reached the same conclusion." *Id.* at 7a (alteration in original), 10a.

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[2] The court rejected the referee's recommendations concerning a separate alleged violation respecting certain statements made to a reporter. Pet. App. 2a, 15a-16a.

With respect to narrow tailoring, the court explained that "personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impartiality." Pet. App. 11a. The canon "is narrowly tailored," the court concluded, because candidates still may "utilize a separate campaign committee to engage in the task of fundraising" on their behalves, thereby "leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns." *Id.* at 15a (quoting *Simes* v. *Ark. Judicial Discipline & Disability Comm'n*, 247 S.W.3d 876, 883 (Ark. 2007)).

In reaching that conclusion, the court explained that Canon 7C(1) is "similar to Canons 4.1(A)(8) and 4.4 of the American Bar Association Model Code of Judicial Conduct," that "[a] majority of states have enacted similar provisions," and that "every state supreme court that has examined the constitutionality of comparable state judicial ethics canons has concluded that these types of provisions are constitutional." Pet. App. 11a-13a. The court acknowledged, however, that the federal courts of appeals, "whose judges have lifetime appointments and thus do not have to engage in fundraising," were divided on the question. *Id.* at 13a n.3.

The court declared that "[b]y publication of this opinion, Lanell Williams-Yulee is hereby publicly reprimanded," and required petitioner to pay the costs of the proceeding. Pet. App. 18a. Pursuant to Florida Bar Rule 3-5.4(a) all disciplinary sanctions "are public information." Sanctions imposed within the last ten years are posted to attorneys' individual Florida Bar profiles at the Bar's website. Petitioner's profile notes that she has been subject to a sanction

within the past ten years and provides a link to obtain the details of the case.[3]

Chief Justice Polston and Justice Canady dissented in part without opinion. Pet. App. 18a.[4]

SUMMARY OF ARGUMENT

Canon 7C(1)'s ban on contribution solicitations by judicial candidates is subject to strict scrutiny review, for two reasons. It is a content-based regulation, applicable only to speech soliciting campaign contributions. And it prohibits speech at the core of the First Amendment—the speech of candidates for elective office.

This Court has repeatedly emphasized that a challenged speech restriction rarely survives strict scrutiny. Canon 7C(1) is not one of the rare exceptions to that general rule, because it is not narrowly tailored to serve a compelling state interest.

To begin with, the restriction cannot be justified based on a state interest in preventing *quid pro quo* corruption. The State has the very same interest with respect to other elected officials but limits its ban on solicitations of financial support to judicial candidates. That fact alone demonstrates that the

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[3] Petitioner's profile can be accessed at https://www.floridabar.org/names.nsf/MESearchDK?OpenForm by searching for her name. Clicking "Yes" next to "10-Year Discipline History" accesses the case reference number, and clicking on the reference number accesses the Bar complaint, referee decision, and Florida Supreme Court decision in this case.

[4] Chief Justice Polston and Justice Canady had concluded in a prior case that Canon 7C(1) violated the First Amendment. *In re Turner*, 76 So. 3d 898, 910-913 (Fla. 2011) (Canady, C.J., concurring in result).

prohibition is not necessary to promote that state interest.

The state has a compelling interest in preventing judicial bias, but Canon 7C(1)'s underinclusiveness substantially "diminish[es] the credibility of the government's rationale for restricting speech." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 52-53 (1994). That is because the regulation does not prohibit judicial candidates from learning who has contributed and who has not—and it is the ***knowledge*** of who does and does not contribute, not the identity of the individual making the solicitation, that introduces the potential for bias.

Indeed, the judicial candidate may be told who donated to her campaign (and how much they gave) and who did not. She may serve as campaign treasurer. She may write thank-you notes to donors. And she may ask individuals to contribute time and effort to her campaign. The prohibition against solicitation of contributions cannot be justified as necessary to prevent bias when the candidate is free to learn who donates and to acknowledge contributors' assistance to her campaign.

Canon 7C(1) fails strict scrutiny for the additional reason that it is overinclusive, prohibiting speech that carries no risk of bias. "No one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge." *Carey* v. *Wolnitzek*, 614 F.3d 189, 205 (6th Cir. 2010) (Sutton, J.).

Moreover, the State can and does employ alternative measures to prevent bias that are less restrictive of protected speech. Recusal rules prevent judges

from presiding over matters in which their impartiality might plausibly be questioned, without intruding on First Amendment rights. And contribution limits effectively prevent bias as well.

Finally, even if these flaws do not render Canon 7C(1) unconstitutional on its face, the regulation is unconstitutional as applied to petitioner in this case. The disciplinary sanctions imposed on petitioner for engaging only in written speech to a broad audience clearly violate the First Amendment.

ARGUMENT

PETITIONER'S SOLICITATION OF CAMPAIGN CONTRIBUTIONS IS PROTECTED BY THE FIRST AMENDMENT.

"The interests here at issue are at the heart of the First Amendment," which "'has its fullest and most urgent application to speech uttered during a campaign for political office.'" *Nev. Comm'n on Ethics* v. *Carrigan*, 131 S. Ct. 2343, 2353 (2011) (quoting *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). Florida's rule prohibiting candidates for judicial office from personally soliciting campaign funds infringes core First Amendment interests—prohibiting an essential category of speech by candidates for elective judicial office.

The justifications advanced in support of this prohibition do not come close to satisfying strict scrutiny review. Florida's ban is underinclusive, neglecting other serious threats to the claimed state interests—and thereby demonstrating that those interests are not sufficiently compelling to justify the broad speech restriction—and overinclusive, because less restrictive alternatives are available to further Florida's claimed interests. The regulation under

which petitioner was sanctioned therefore violates the First Amendment and should be overturned by this Court.

A. Canon 7C(1) Is Subject To Strict Scrutiny Review.

"[T]he proper test to be applied to determine the constitutionality" of a restriction that either "prohibits speech on the basis of its content" or "burdens a category of speech that is 'at the core of our First Amendment freedoms'" is "what [this Court's] cases have called strict scrutiny." *Republican Party of Minn.* v. *White* (*White I*), 536 U.S. 765, 774 (2002) (quoting *Republican Party of Minn.* v. *Kelly*, 247 F.3d 854, 861 (8th Cir. 2001)). Canon 7C(1) is subject to strict scrutiny on both grounds.

To begin with, the canon is triggered by "the message [that the speech] conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). If a candidate for judicial office sends a letter that includes a request for campaign contributions, she has violated the canon; if she sends the same letter, minus the request for money, she has not. There is no denying, therefore, that applicability of the canon "is determined by the content of a [candidate's speech]." *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). For that reason alone, the canon "must satisfy strict scrutiny." *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 469 (2009).

Canon 7C(1) also burdens speech that "'is at the core of our electoral process and of the First Amendment freedoms.'" *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222-223 (1989) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968)). "[I]t can hardly be doubted that the constitutional

[free speech] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam)). That is certainly so here because, although solicitation of money by itself may not constitute a purely political message, "the reality [is] that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views." *Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

To survive a constitutional challenge, therefore, Canon 7C(1) must satisfy strict scrutiny. See *Eu*, 489 U.S. at 223-224 (applying strict scrutiny to a law that "hamper[ed]" and "censor[ed]" the speech of candidates for elective office); *Pleasant Grove*, 555 U.S. at 469 ("any restriction based on the content of the speech must satisfy strict scrutiny").

Neither respondent nor the Florida Supreme Court disputed the applicability of strict scrutiny review here. But some lower courts have held that the constitutionality of similar speech restrictions should be evaluated under the less rigorous "closely drawn scrutiny" standard. See *Siefert* v. *Alexander*, 608 F.3d 974, 988 (7th Cir. 2010); *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990). That is manifestly wrong.

Closely drawn scrutiny applies only to "contribution limits" and "mechanism[s] adopted to implement * * * contribution limit[s]." *McConnell* v. *FEC*, 540 U.S. 93, 137 (2003). Canon 7C(1) does not fall within those categories: it does not regulate *who* may contribute or *how much* they may contribute, but is instead a categorical ban on particular speech by can-

didates for elective office. *Cf. Schaumburg*, 444 U.S. at 637 (applying strict scrutiny to a prior restraint on the solicitation of charitable contributions). Strict scrutiny is the applicable standard here.[5]

B. Canon 7C(1) Is Not Narrowly Tailored To Serve A Compelling State Interest.

This Court has emphasized that it is "the rare case in which * * * a law survives strict scrutiny" (*Burson* v. *Freeman*, 504 U.S. 191, 211 (1992)), and this is not one of those rare instances. "To survive strict scrutiny, * * * a State must do more than [identify] a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest" (*id.* at 199) and "that it does not 'unnecessarily circumscribe protected expression'" in the process (*White I*, 536 U.S. at 775 (quoting *Brown* v. *Hartlage*, 456 U.S. 45, 54 (1982))). Canon 7C(1) fails on both scores: it is "both underinclusive and overinclusive." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 793 (1978).

Even if, contrary to our submission, the ban on candidate solicitation were subject to closely drawn scrutiny, the First Amendment would bar its application to petitioner here. The disconnect between the

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[5] The Court in *McConnell* did suggest that closely drawn scrutiny applies to limited restrictions on the personal solicitation of contributions to third-party PACs, but it did so because the selective solicitation ban was designed to "prevent political parties from using tax-exempt organizations as soft-money surrogates" to create an end-run around contribution limits. *McConnell*, 540 U.S. at 177. Thus, the limited ban was one element of a broader regulation of third-party contributions, not candidate speech. See *id.* at 138. The rationale is wholly inapplicable to Canon 7C(1), which is a standalone, across-the-board ban on all solicitations by candidates for judicial office.

governmental interests asserted and Canon 7C(1) is so substantial that the regulation is unconstitutional even under this somewhat reduced standard.

1. Preventing judicial corruption and bias are compelling state interests.

The threshold inquiry in applying the strict scrutiny standard is identifying the government interests advanced as sufficiently weighty to justify the speech restriction. *White I*, 536 U.S. at 775 ("[c]larity on [the asserted interest] is essential" to a strict scrutiny analysis). Respondent asserted below that Canon 7C(1)'s purposes are "to prevent the appearance of quid pro quo, bias or corruption, and to preserve the integrity of our judiciary and maintain the public's confidence in an impartial judiciary." Am. Answer Br. 8. For its part, the Florida Supreme Court concluded that "protecting the integrity of the judiciary, as well as maintaining the public's confidence in an impartial judiciary, represent compelling State interests." Pet. App. 10a.

Since *Buckley* v. *Valeo*, this Court has recognized the government's interest in preventing *quid pro quo* corruption. 424 U.S. 1, 25-27 (1976); see also *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1441 (2014); *Citizens United* v. *FEC*, 558 U.S. 310, 359 (2010).

The "integrity of the judiciary" is a somewhat vague concept, but it appears largely coextensive with the notion of "judicial impartiality." The word integrity means "adherence to a code of * * * values," "avoidance of deception," and "honesty" (*Webster's Third New International Dictionary* 1174 (2002))—all of which, in the context of judging, suggests avoidance of bias. The "traditional" understanding of judicial impartiality, as this Court has explained, "is

the lack of bias for or against either party to the proceeding." *White I*, 536 U.S. at 775-776 (emphasis omitted). "Impartiality in this sense assures equal application of the law" and "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Ibid.*[6] Preventing actual judicial bias is for those reasons a compelling governmental interest. See *White I*, 536 U.S. at 793 (Kennedy, J., concurring) ("Judicial integrity is * * * a state interest of the highest order.").

But in the proceedings below, respondent insisted that there was more—that Canon 7C(1) prevents not only *actual* bias and corruption, but also the simple *appearance* of those adverse consequences. Am. Answer Br. 8. The lower court agreed, holding that the State has a compelling interest in "maintaining the public's confidence" in the judiciary, presumably regardless of whether that confidence is based on appearance or reality. Pet. App. 10a.

The Florida court is not alone in reaching that conclusion. Other courts have suggested that "maintaining the appearance of impartiality * * * is essential to protect the judiciary's reputation for fairness in the eyes of all citizens." *Wersal* v. *Sexton*, 674 F.3d 1010, 1022 (8th Cir. 2012) (en banc). "The judicial system depends on its reputation for impartiality,"

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[6] The Court identified two other meanings of impartiality in *White I*, including the "lack of preconception in favor of or against a particular *legal view*" and "willing[ness] to consider views that oppose [a judge's] preconceptions." 536 U.S. at 777-778. To the extent either of those alternative meanings has any relevance here, it is only insofar as each is partially coextensive with the avoidance of favoritism to a particular party (and therefore the legal arguments the party happens to espouse).

those courts have stated, because "it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife." *Bauer* v. *Shepard*, 620 F.3d 704, 712 (7th Cir. 2010).

An "*appearance* of bias" standard raises a host of questions. For example:

- Appearance of bias to *whom*—participants in the legal system or citizens at large?
- Must the appearance of bias be based on the views of the relevant audience in possession of all of the pertinent facts (*e.g.*, other protections against biased decisionmaking) or would it suffice if there were an appearance of bias based on uninformed or erroneous views of the pertinent facts?
- How widely must the perception of bias be held within the target "audience" for its prevention to qualify as a compelling interest?
- How would courts undertake the "appearance" inquiry—based on their own perceptions or based on evidence such as public opinion polls?

These would be uncertain foundations for upholding a restriction on protected speech. Protecting the judiciary's reputation and preventing the perception of judicial bias could conceivably support all manner of restrictions—not only on speech uttered by candidates for judicial office, but also on speech by "campaign committees, lawyers, law firms, contributors, solicitors, endorsers, supporters, opponents, the press and others too numerous to mention." *Wersal*, 674 F.3d at 1046 (Beam, J., dissenting).

The Court need not determine whether avoiding the mere appearance of judicial bias and corruption, and not just their actuality, is a compelling governmental interest. Canon 7C(1) is so poorly tailored to even those potentially broad interests that it clearly fails strict scrutiny review.

2. *The prohibition's dramatic underinclusiveness demonstrates that it does not accomplish the State's claimed purposes.*

To survive strict scrutiny, a content-based regulation of speech must "satisfactorily accomplish[] its stated purpose." *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 541 (1989). A regulation that is "underinclusive[]" in scope—one that does too little to meaningfully advance the interests invoked to justify the rule—"raises serious doubts about whether [the State] is, in fact, serving, with [the regulation], the significant interests" asserted. *Id.* at 540. After all, "[a] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *White I*, 536 U.S. at 780 (quoting *The Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring in part and concurring in the judgment)).

The dramatic underinclusiveness of Canon 7C(1)—the State's willingness to permit injury to the claimed interests through other means—therefore "render[s] belief in that purpose a challenge to the credulous." *Ibid.*; see also *City of Ladue* v. *Gilleo*, 512 U.S. 43, 52-53 (1994) (underinclusiveness significantly "diminish[es] the credibility of the government's rationale for restricting speech").

To begin with, the restriction cannot be justified based on the interest in preventing *quid pro quo* corruption. The State has the very same interest with respect to other elected officials but limits its prohibition on contribution solicitation to judicial candidates. That fact alone demonstrates that the prohibition is not necessary to protect that state interest.

The same conclusion applies with respect to the state interest in preventing judicial bias. Canon 7C(1) is significantly underinclusive in three separate ways—and therefore confirms the absence of any compelling interest justifying the speech regulation.

First, Canon 7C(1) does not prohibit judicial candidates from learning who has contributed and who has not—and it is the *knowledge* of who does and does not contribute, not the identity of the individual making the solicitation, that introduces the potential for bias.

The canon expressly permits judicial candidates' campaign committees to solicit campaign contributions. Committee members may, in turn, tell the candidate who gave generously and who balked in response to those requests. See Judicial Ethics Opinion 77-22, 1978 WL 420332 (Fla. Jud. Eth. Adv. Comm. 1978); Judicial Ethics Advisory Comm., An Aid to Understanding Canon 7, at 15-16 (July 19, 2006), available at http://perma.cc/J5AN-95D9. And nothing prevents candidates from reviewing the committee's public reports of campaign contributions. In fact, judicial candidates may even serve as the treasurers of their own campaign committees, making clear that there is no obstacle to review by the candidate of all of the donations made to the

campaign. See Fla. Stat. § 106.021(1)(c); An Aid to Understanding Canon 7, at 14.

If prevention of the potential for bias is the goal, it makes no difference whether a candidate personally requests a donation from a supporter or instead instructs her campaign manager to do it for her. Either way—so long as the candidate learns of the outcome of the request—the potential for bias is present.

Respondent argued below that solicitations made personally by candidates for judicial office create the *appearance* of partiality. Am. Answer Br. 8 ("The purpose of [the solicitation ban] is to * * * maintain the public's confidence in an impartial judiciary."). The claim is that recipients of personal requests for money may feel unduly pressured to make a donation for fear of upsetting the candidate and falling into disfavor. As we explain below (see pages 22-23, *infra*), that argument, even if correct, could not justify application of the regulation to the mass mailing and Internet solicitation at issue here.

In any event, a potential donor who knows the candidate will learn whether a donation was given or refused will feel precisely the same pressures. That is all the more true because, once candidates are made aware of donations given, they are free to send personal thank-you messages. See Judicial Ethics Opinion 92-02 (Fla. Jud. Eth. Adv. Comm. 1992), available at http://perma.cc/7QEU-C9UJ (thank-you letters permitted but cannot be on official letterhead); Judicial Ethics Opinion 77-22 (thank-you letters must be "in good taste").

Canon 7C(1) thus "prevent[s] a candidate from sending a signed mass mailing to every voter in the district but permit[s] the candidate's best friend to

ask for a donation directly from an attorney who frequently practices before the court," and to report back to the candidate with the results of the request. *Carey*, 614 F.3d at 205. "[I]f impartiality or absence of corruption is the concern, what is the point of prohibiting judges from personally asking for solicitations or signing letters, if they are free to know who contributes and who balks at their committee's request?" *Wolfson* v. *Concannon*, 750 F.3d 1145, 1157-1158 (9th Cir.), reh'g en banc granted, 768 F.3d 999 (9th Cir. 2014).

Second, Canon 7C(1) permits judicial candidates to solicit a variety of other types of support. They can ask individuals to serve on their campaign committees—a significant position, given the important role the committee plays in soliciting contributions and endorsements. Because Florida law excludes volunteer services from its definition of a "contribution" (Fla. Stat. § 106.011(5)(d)), they can ask individuals to "volunteer to work on [the] campaign" (*McCutcheon*, 134 S. Ct. at 1441). And they can ask nonlawyers publicly to "urge others to vote for [the] candidate." *Ibid.*

A candidate's request for these commitments of personal time raises all the same risks as personal requests for money. Canon 7C(1) thus "leaves appreciable damage" to judicial impartiality "unprohibited." *White I*, 536 U.S. at 780 (quoting *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in judgment)).

Third, Florida law also permits a judicial candidate to learn the identities of those individuals or groups making independent expenditures in connection with her election. These expenditures can be significant. *Caperton* v. *A.T. Massey Coal Co.*, 556

U.S. 868 (2009), involved a donor who gave only $1,000 directly to a West Virginia justice's campaign committee but spent an additional $2.5 million through an independent political action committee. *Id.* at 873.[7]

The fact that a candidate may learn who is behind such significant expenditures undermines the claim that the State has a compelling interest in preventing the candidate from soliciting contributions, particularly because contributions are capped at $1,000 for the office sought by petitioner. Fla. Stat. § 106.08(1)(a)(2).

Fourth, rules like Canon 7C(1) have troubling implications for the fairness of judicial elections. Most notably, such rules favor "incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." *Carey*, 614 F.3d at 204. The fact that the regulation stacks the deck in favor of incumbents and other well-connected lawyers—like other campaign regulations considered by this Court[8]—further undermines the claim that it serves a compelling interest.

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[7] Independent expenditures on state supreme court campaigns totaled $24.1 million in the 2011-2012 election cycle. Alicia Bannon et al., *The New Politics of Judicial Elections 2011-12*, Brennan Ctr. for Justice, 4 (Oct. 2013), http://perma.cc/8FN9-YQH2. More than $3.3 million was spent on Florida's Supreme Court retention elections alone. *Id.* at 6.

[8] See, *e.g.*, *Randall* v. *Sorrell*, 548 U.S. 230, 248-49 (2006); *McConnell*, 540 U.S. at 306-307 (Kennedy, J., concurring in part and dissenting in part); see also *id.* at 249-250, 260-263 (Scalia, J., concurring in part and dissenting in part).

3. Canon 7C(1) is impermissibly over-inclusive because there are less restrictive means of furthering the asserted state interests.

A content-based speech restriction "must be the least restrictive means of achieving [the] compelling state interest" that it is alleged to support. *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2530 (2014) (citing *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)). Thus, "[w]hen a plausible, less restrictive alternative is offered," the State must "prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Grp.*, 529 U.S. at 816.

Although "[a] complete ban" on a category of speech is not per se invalid, it will survive strict scrutiny "only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988). The State therefore must show that *every* form of personal solicitation endangers its interests in preserving impartiality and preventing corruption. That it cannot do.

Canon 7C(1) broadly prohibits *all* personal solicitations of campaign donations. There are no exceptions to this rule: it applies to signed mass mailings like the one petitioner sent in this case, as it does to one-on-one exchanges over dinner at a fundraising event.

Solicitations conveyed through mass mailings or a request posted on a website create no serious risk of either the reality or appearance of judicial bias or *quid pro quo* corruption. "No one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge." *Carey*,

614 F.3d at 205. In fact, a mass mailing may not generate any contributions at all, as was the case with petitioner's mailing here. Hearing Tr. 47-48 (Apr. 13, 2012). It is impossible to see how an ineffective solicitation that generates no responses, taken alone, could impugn the integrity of the judiciary.

The same conclusion applies to speeches to large gatherings. There is no serious possibility that "a speech requesting donations from a large gathering [would have] a coercive effect on reasonable attendees." *Carey*, 614 F.3d at 205. It is simply implausible to think that an attendee at a large rally could in fact curry improper favor (or appear to do so) by making a donation in response to a general request by the candidate during her speech. Canon 7C(1) thus burdens substantially more speech than necessary to achieve the particular interests the State has asserted.

Moreover, the State can pursue its asserted interests through means much less restrictive of protected speech. Recusal provides an important, and effective, protection against bias and the appearance of bias. Florida Canon of Judicial Conduct 3E(1), for example, provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," including when "the judge has a personal bias or prejudice concerning a party or a party's lawyer." Fla. Code of Jud. Conduct, Canon 3E(1)-(1)(a). Similarly, Florida law allows parties to disqualify judges by filing affidavits stating that they fear they will not receive a fair hearing "on account of the prejudice of the judge * * * against the applicant or in favor of the adverse party." Fla. Stat. § 38.10.

Recusal rules like these prevent judges from presiding over matters in which their impartiality might plausibly be questioned, without intruding on the First Amendment rights of judicial candidates in conducting their campaigns. See Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563, 614 (2004) ("[T]he proper response to judicial campaign speech that could threaten [judicial bias] may be to allow the speech and then, if a case arises in which a judge's former campaign speech poses a problem, to assign that case to another judge.").

In contrast to the alternative of recusal, Canon 7C(1) does little to address any risk of bias that may result from judicial fundraising. The same risk follows from donations solicited by campaign committees and disclosed to candidates, as well as from candidates' personal solicitations of donations of time—all of which are unchecked by Canon 7C(1). Indeed, the canon arguably creates a false sense of separation between the candidate and contributions that has little basis in reality—and may therefore prevent the application of more effective remedies, such as recusal, when there is a real risk of bias.

Moreover, any burdens associated with recusal are not insurmountable and therefore provide no basis for imposing an across-the-board restriction on campaign speech at the core of the First Amendment. "If it is said that [recusals] are less efficient and convenient than" personal solicitation bans, "the answer is that considerations of this sort do not empower a [State] to abridge freedom of speech." *Schaumburg*, 444 U.S. at 639 (quoting *Schneider* v. *State*, 308 U.S. 147, 164 (1939)). The *Caperton* Court concluded that

any difficulty in effectuating recusal could not excuse a violation of the Due Process Clause; neither should it permit an abridgement of free speech.

Contribution limits furnish yet another less restrictive means of avoiding bias and corruption (or the appearance of either) resulting from judicial campaign fundraising. Under Florida law, individuals and political committees may not donate more than $3,000 to a state supreme court candidate or $1,000 to a county court, circuit court, or district court of appeals candidate in a single election. Fla. Stat. § 106.08(1)(a). Florida's "selection of [these] base limit[s] indicates its belief that contributions of [those] amount[s] or less do not create a cognizable risk of corruption" or partiality. *McCutcheon*, 134 S. Ct. at 1452. Unlike a blanket ban on personal solicitations, these sorts of "contribution limits * * * entail only a marginal restriction upon the contributor's ability to engage in free communication." *McConnell*, 540 U.S. at 134-135 (internal quotation marks and brackets omitted) (quoting *Buckley*, 424 U.S. at 19); see also *id.* at 136 ("contribution restrictions" impose "limited burdens * * * on First Amendment freedoms"). They also are more effective, because they also protect against any risk of bias and corruption that follows from requests made by a candidate's committee on the candidate's behalf.

The fundamental purpose of the narrow-tailoring requirement is "to ensure that speech is restricted no further than necessary to achieve the [State's asserted] goal, for it is important to assure that legitimate speech is not chilled or punished." *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004). Otherwise, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights

through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole." *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003) (citation omitted).

That impermissible outcome is what Canon 7C(1) guarantees. Apart from unnecessarily suppressing speech in the plainest of ways, the canon encourages candidates for judicial office to censor themselves in communications of every sort for fear that what they say may be taken as a solicitation of financial support. For example, the Kentucky Ethics Commission has interpreted Kentucky's personal solicitation ban as covering any communication in which a candidate may happen to make her "wants or desires" for campaign contributions "known," regardless whether the communication is a "personal appeal" or something as impersonal as a generic campaign "advertisement." Judicial Ethics Opinion JE-42, 1983 WL 872765 (Eth. Comm. Ky. Jud. 1983).

Some prospective candidates may even be discouraged from running for judicial office at all. See *Republican Party of Minn.* v. *White*, 416 F.3d 738, 746 (8th Cir. 2005) (en banc) (*White II*) ("Wersal, fearful that other complaints might jeopardize his opportunity to practice law, withdrew from the race."). Against this backdrop, Canon 7C(1) is not narrowly tailored to achieve a compelling state interest.

* * * * *

A final point bears emphasis. The experience in other States that choose judges through election provides strong evidence that contribution solicitation bans like Canon 7C(1) do not meaningfully advance the State's interest in judicial impartiality.

Ten States that elect judges do not regulate the solicitation of donations by judicial candidates.[9] Among those other States that elect judges and *do* restrict personal solicitations, four make exceptions to their solicitation bans for mass mailings,[10] and three make exceptions for speeches to more than 20 or 25 people.[11]

There is no evidence that judges in these States lack impartiality or that their citizens lack sufficient confidence in their judicial systems. Respondent cannot "explain what makes [Florida's] system so peculiar" that it "has determined that such [a categorical personal solicitation] ban is necessary." *Eu*, 489 U.S. at 226.

That is not to say that the interests at stake here are unimportant or unworthy. But "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process * * * the First Amendment rights that attach to their roles." *White I*, 536 U.S. at

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[9] See Ala. Canons of Jud. Ethics, Canon 7(B)(4)(a) ("strongly discourag[ing]" personal solicitation) ; Cal. Code of Jud. Ethics, Canon 5(A) (Advisory Comm. Commentary); Ga. Code of Jud. Conduct, Canon 7(B)(2); Kan. Code of Jud. Conduct, Rule 4.4(A); Md. Code of Jud. Conduct, Canon 4.4(a), cmt. 2; Mont. Code of Jud. Conduct, Rule 4.4, cmt. 1; Nev. Code of Jud. Conduct, Rule 4.4, cmt. 1; N.M. Code of Jud. Conduct, Rule 21-402(C)(1); N.C. Code of Jud. Conduct, Canon 7(B)(4); Tex. Code of Jud. Conduct, Canon 4(D)(1).

[10] See Minn. Code of Jud. Conduct, Canon 4.2(B)(3); Mo. Code of Jud. Conduct, Canon 4.2(B); N.D. Code of Jud. Conduct, Rule 4.6; Ohio Code of Jud. Conduct, Rule 4.4(A)(2).

[11] Minn. Code of Jud. Conduct, Canon 4.2(B)(3) (20 people); N.D. Code of Jud. Conduct, Rule 4.6 (25 people); Ohio Code of Jud. Conduct, Rule 4.4(A)(1) (20 people).

788 (quoting *Renne* v. *Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). The Florida Supreme Court's contrary conclusion rests on the "notion that the special context of electioneering justifies an *abridgment* of the right to speak," which "sets [this Court's] First Amendment jurisprudence on its head." *Id.* at 781.

4. At a minimum, Canon 7C(1) is unconstitutional as applied to petitioner.

Even if, contrary to our submission, these flaws do not render Canon 7C(1) unconstitutional on its face, the Court should hold the regulation unconstitutional as applied to petitioner in this case.

Given the general weakness of the State's compelling interest, as demonstrated by the underinclusiveness of its rule, and the particular absence of any justification for applying the solicitation prohibition to a mass mailing and website posting, the disciplinary sanctions imposed on petitioner for engaging only in written speech to a broad audience clearly violate the First Amendment.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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NOVEMBER 2014

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[12] The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

RESPONDENT'S BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE

Petitioner,

v.

THE FLORIDA BAR

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

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SUMMARY OF ARGUMENT

The Court has consistently recognized that states have a compelling interest in maintaining public confidence in the integrity of the judiciary, among other public offices. The Court has further recognized that the potential for corrupt influence and the appearance of such corruption-which is inherent in *quid pro quo* contributions to, and direct solicitation of contributions from, political candidates-undermines public confidence in the integrity of elected officials.

Consequently, a state may constitutionally enact regulations designed to avoid the potential for *quid pro quo* corruption and appearance of corruption, provided that such regulations effectively serve the state's interest and are narrowly tailored.

Canon 7C(1) serves the State of Florida's interest in avoiding the potential for *quid pro quo* corruption and the appearance of corruption by breaking the direct link between contributors and judicial candidates. The Canon is narrowly tailored because it places no restrictions on the ability of judicial candidates and their supporters to engage in free and robust expression. The restriction on a judicial candidate's personal solicitation of campaign funds also places a minimal burden on the candidate's money-raising ability because an independent committee of the candidate's supporters is permitted by the Canon to raise money on behalf of the candidate.

Contrary to Petitioner's argument, Canon 7C(1) is not underinclusive. The fact that the Canon applies only to judicial candidates is not the type of factor that has fallen within the underinclusiveness doctrine for

purposes of this Court's First Amendment analysis. Just because the Canon does not apply to the executive and legislative branches does not render it ineffective to serve its intended purpose and does not cast suspicion on the Florida Supreme Court's true motive as was the case with regulations found by this Court to be underinclusive. The Canon is limited to judicial candidates because the judicial branch is the only branch over which the Florida Supreme Court, which adopted the Canon, has regulatory authority.

The ability of a judicial candidate to learn the identities of contributors does not undermine the purpose of Canon 7C(1) or make it underinclusive. Because the money is raised and managed by persons other than the candidate, and because the contributor has no way of knowing whether the candidate will ever learn of the contribution and the candidate does not know whether the contribution was actually attributable to the relationship between the contributor and the money-raiser, the linkage between the contributor and the candidate that is necessary for a *quid pro quo* corruption potential is lacking.

Petitioner's argument that Canon 7C(1) is underinclusive because it does not prohibit a candidate from soliciting non-monetary support could just as well have been made with respect to the contribution limits upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). The State could reasonably have believed that the potential for corruption and the appearance of corruption are more pronounced with monetary contributions than voluntary labor. In any case, the Court has recognized that, in regulating campaign financing, reform may take one step at a time.

Petitioner's argument that Canon 7C(1) is overinclusive because it prohibits solicitations by mass mailing or speeches to large gatherings is also untenable. Any attempt to draw a meaningful line at the point at which a mailing or audience becomes large enough to create the potential for *quid pro quo* corruption or the appearance of corruption would be judicially unmanageable. Under such circumstances, the State has wide discretion as to where to draw the line.

Finally, the State may reasonably conclude that rules requiring recusal and limits on the amount of contributions are not adequate substitutes for a ban on personal solicitation. The degree of bias requiring recusal is a highly subjective determination left mainly to the judge who receives the contribution. The State could reasonably have concluded that a prohibition of personal solicitation by judicial candidates was more effective at avoiding the potential for *quid pro quo* corruption and, particularly, the appearance of such corruption, than contribution limits and the possibility of recusal. The argument is comparable to the argument rejected in *Buckley* that bribery and disclosure statutes were more narrow alternatives to contribution limits.

ARGUMENT

I. THE STATE HAS A COMPELLING INTEREST IN AVOIDING THE ACTUALITY AND APPEARANCE OF CORRUPT INFLUENCE OF JUDGES.

This Court has often emphasized that states have an "interest of the highest order" in ensuring the integrity of judges and other officers, and maintaining public confidence in such integrity:

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring). *See also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (finding that public confidence in the fairness and integrity of the nation's elected judges "is a vital state interest"); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. * * * But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'")

The Court in *White* struck down a state regulation that directly restrained judicial candidates' freedom of speech by prohibiting such candidates from announcing their views on disputed legal or political issues. However, the decision followed and distinguished a line of cases beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976), and continuing through *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014), decided this year, that upheld restrictions on campaign contributions to candidates and solicitations for such contributions by candidates. In *Buckley*, the Court recognized the risk to the integrity of our political system posed by *quid pro quo* corruption:

> It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. * * * To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.

Buckley, 424 U.S. at 26. The Court emphasized that the appearance of corruption that is inherent in *quid pro quo* contributions was almost equally important:

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id.; *accord McCutcheon*, 134 S. Ct. at 1445 ("*Buckley* held that the Government's interest in preventing *quid pro quo* corruption or its appearance was 'sufficiently important'; we have elsewhere stated that the same interest may properly be labeled 'compelling,' so that the interest would satisfy even strict scrutiny") (*citing Buckley*, 424 U.S. at 26-27 and *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 137 (2003) (noting the importance of the government's "interests in preventing 'both the actual

corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'"), *overruled in part on other grounds, Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized.").

In addressing *quid pro quo* corruption, the Court has not only upheld restrictions on contributions *to* candidates, but also on solicitations of contributions *by* candidates. In *McConnell*, the Court upheld section 323(e) of the Bipartisan Campaign Reform Act of 2002, which prohibited candidates from soliciting campaign funds that exceeded monetary limits or came from sources prohibited by the Act. Even Justice Kennedy, joined by Chief Justice Rehnquist, both of whom dissented from portions of the opinion regarding other provisions of the Act, agreed that section 323(e)'s ban on certain solicitations was constitutional:

> Ultimately, only one of the challenged Title I provisions satisfies *Buckley's* anticorruption rationale and the First Amendment's guarantee. It is § 323(e). This provision is the sole aspect of Title I that is a direct and necessary regulation of federal candidates' and officeholders' receipt of *quids*.

McConnell, 540 U.S. at 308 (Kennedy, J., concurring). Justices Kennedy and Rehnquist went so far as to agree with the majority that even solicitation by a candidate of funds to be given to a third party could be restricted:

> The regulation of a candidate's receipt of funds furthers a constitutionally sufficient interest. More difficult, however, is the question whether regulation of a candidate's solicitation of funds also furthers this interest if the funds are given to another. I agree with the Court that the broader solicitation regulation does further a sufficient interest. The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates' or officeholders' solicitation of contributions are, therefore, regulations governing their receipt of *quids*. This regulation fits under *Buckley's* anticorruption rationale.

Id.

Petitioner attempts to brush aside *McConnell's* upholding of section 323(e)'s solicitation restrictions in a footnote stating that the Court did so "because the selective solicitation ban was designed to 'prevent political parties from using tax-exempt organizations as soft-money surrogates' to create an end-run around contribution limits." Pet'r's Br. at 13 n. 5. The portion of the *McConnell* opinion referenced by Petitioner, however, was not discussing section 323(e) at all. It was referring to section 323(d) of the Act, a portion of the opinion with which Justices Kennedy and Rehnquist dissented. Nothing in the majority opinion or the concurring opinion by Justices Kennedy and Rehnquist suggests that the decision to uphold section 323(e) was limited to the circumstances discussed with respect to section 323(d). To the contrary, the opinions make clear that the solicitation of a contribution by a candidate is, like the contribution

itself, part of the *quid*, which creates both the opportunity for corruption and the appearance of corruption. Other than the footnote, Petitioner makes no effort to explain why the reasoning that led to the Court's upholding of section 323(e) would not apply to Canon 7C(1).

Petitioner argues that in states that elect judges but do not regulate personal solicitation of contributions, there is no evidence that judges lack impartiality or that citizens lack confidence in their judicial system. The Court has recognized the difficulty of determining actual bias. *See Caperton*, 556 U.S. at 883 ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.") However, even in the absence of evidence of the occurrence of actual corruption, the Court has found a sufficient governmental interest arising from the *quid pro quo* potential for corruption and the appearance of corruption "inherent" in certain contributions and solicitation of contributions directly to candidates:

> [*Buckley*] stated that even if actual corrupt contribution practices had not been proved, Congress had an interest in regulating the appearance of corruption that is 'inherent in a regime of large individual financial contributions.' The *quid pro quo* nature of candidate contributions justified the conclusion that the contributions pose inherent corruption potential; and this in turn justified the conclusion that their regulation would stem the appearance of real corruption.

McConnell, 540 U.S. at 298 (Kennedy, J., concurring) (citation omitted).

Moreover, there is abundant evidence that the public perceives campaign contributions to judicial candidates as having an undue influence on judges' decisions. *See White*, 536 U.S. at 790 (O'Connor, J., concurring); The Annenberg Public Policy Center, *Public Understanding and Support for the Courts* (Oct. 2007) (available at www.annenbergpublicpolicy.org) (indicating that 69 percent of the public think that raising money for elections affects a judge's rulings to a moderate or great extent); Zogby International, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* (May 2007) (available at www.justiceatstake.org) (poll finding that four in five business leaders worry that financial contributions have a major influence on decisions rendered by judges and that there is "near-universal" concern among business leaders that campaign contributions will make judges accountable to other interests rather than the law and the Constitution); National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey* (May 1999) (available at www.ncsc.org) (indicating that 75 percent of the public believe that elected judges are influenced by having to raise campaign funds); Supreme Court of Pennsylvania, *Report of the Special Commission to Limit Campaign Expenditures* (March 1998) (available at www.pacourts.us) (reporting that an independent survey of registered voters in Pennsylvania indicated a belief that campaign contributions lead to special treatment, including from judges); Supreme Court of Ohio, *Report of the Citizens' Committee on Judicial Elections* (Jan. 1995) (reporting that nine out of ten Ohioans believe that judicial decisions are influenced by contributions to political campaigns).

Significantly, a survey of 2,428 state judges, those in the best position to know, found that 26 percent believe that campaign contributions made to judges influence their decisions from some to a great deal, and another 20 percent believe that campaign contributions have "just a little influence." Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, *National State Judges Frequency Questionnaire* (2002) (available at http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf).

Both common sense and this Court's consistent precedent establish that public confidence in the integrity of the judiciary is essential to the maintenance of a free, stable, and just democracy. Accordingly, the Court has found that states have a compelling interest in avoiding the actuality and appearance of corrupt influence.

II. CANON 7C(1) EFFECTIVELY SERVES THE STATE'S INTEREST BY REMOVING THE *QUID PRO QUO* LINK BETWEEN THE CONTRIBUTOR AND THE CANDIDATE.

Canon 7C(1) strikes at the core of the perceived problem created by *quid pro quo* campaign financing. The Court has recognized that there is a significant distinction between contributions to third persons on behalf of a candidate and contributions directly to the candidate. It is the direct link between the contributor and the candidate that creates the potential for *quid pro quo* corruption and the appearance of corruption. The Court discussed the distinction in *McCutcheon*:

> As an initial matter, there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes

> to a candidate directly. When an individual contributes to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds. The Government admits that if the funds are subsequently re-routed to a particular candidate, such action occurs at the initial recipient's discretion – not the donor's. As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. For those reasons, the risk of *quid pro quo* corruption is generally applicable only to "the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder."

McCutcheon, 134 S. Ct. at 1452 (citations omitted).

In *McConnell*, the Court, in holding that the solicitation provision of section 323(e) was constitutional, found that:

> By severing the most direct link between the soft-money donor and the federal candidate, § 323(e)'s ban on donations of soft money is closely drawn to prevent the corruption or the appearance of corruption of federal candidates and officeholders.[1]

---

1. In *Buckley* and *McConnell*, the Court applied the less rigorous "closely drawn" scrutiny to contributions as contrasted with the exacting scrutiny applied to restrictions on expenditures. That lesser standard would apply to Canon 7C(1) as well. However, as noted above, the Court has found a compelling interest in avoiding the potential for and appearance of corruption occasioned by a candidate's direct solicitation of contributions and, as noted below, Canon 7C(1) is narrowly tailored to meet even the stricter exacting scrutiny standard.

McConnell, 540 U.S. at 182. Canon 7C(1) severs the direct link between the judicial candidate and the contributor by prohibiting the candidate from personally soliciting contributions. The Florida Supreme Court, quoting the Oregon Supreme Court, cogently summarized the significance of the manner in which the Canon severs the link:

> So long as judges are chosen by the electoral process, it will be impossible to deny lawyers and potential litigants the right to give to campaigns or to deny judges the right to seek contributions. Both activities are too important in the scheme of things to permit either to be forbidden outright. Some other, less intrusive method is needed.
>
> [The canon] is that method. It permits the judge to obtain funds to carry out a campaign but eliminates the specter of contributions going from the hand of the contributor to the hand of the judge. The limitation on the ability to raise funds need not cause the campaign to suffer, if the judge picks good people for his or her campaign finance committee. It is true that the committee, however well suited to the task, may have trouble obtaining as much as the judge might have raised by personal buttonholing, but that is the point.

The Fla. Bar v. Williams-Yulee, 138 So. 3d 379, 387 (2014) (quoting *In re Fadeley*, 802 P.2d 31, 41 (1990)).

Petitioner asserts that Canon 7C(1) is underinclusive, and therefore ineffective, for three reasons: (1) it does not apply to non-judicial candidates; (2) it does not prohibit judicial candidates from learning the identity of persons who contribute to their campaigns; (3) it does not prohibit candidates from requesting non-monetary help from supporters. Pet'r's Br. at 18-21. As discussed below, none of these factors render Canon 7C(1) unconstitutional.

(1) Petitioner argues that Canon 7C(1) does not apply to non-judicial candidates –

The Court has not declared regulations unconstitutional on First Amendment grounds simply because they failed to cover every aspect of a problem or every class of tangentially related persons. Rather, the doctrine has been applied to invalidate statutes or regulations when they contain a loophole that renders them ineffective and, therefore, casts suspicion on the true legislative motive. The two cases cited by Petitioner on this point are illustrative. In *White*, the Court invalidated a regulation that prohibited judicial candidates from announcing their views on disputed legal or political issues. In the portion of the opinion cited by Petitioner, the Court noted that the provision allowed judicial candidates to make the exact same statements "up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected." *White*, 536 U.S. at 779-780. The second case cited by Petitioner was *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989). In *White*, the Court quoted Justice Scalia's concurring opinion in *Fla. Star*, that a speech restriction cannot be justified when it "leaves appreciable damage to that supposed vital interest unprohibited." *White*, 536 U.S. at 780. Here, Canon 7C(1)

does not contain such a loophole. By prohibiting judicial candidates from soliciting funds, the Canon effectively serves the State's interest in avoiding the potential for corruption and the appearance of corruption that this Court found was inherent in a direct linkage between contributors and candidates.

Also, contrary to the suggestion of Petitioner, there is no reason for suspicion that there were ulterior motives for adoption of the Canon. The Canon was adopted by the Florida Supreme Court as part of the Florida Code of Judicial Ethics. Under Florida's constitutional separation of powers provision, the Florida Supreme Court has exclusive authority to regulate the ethical conduct of judges and lawyers, but has no authority to impose ethical regulations in either of the other two branches. Fla. Const. art. V, § 3. In any case, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McConnell*, 540 U.S. at 207-208; *Buckley*, 424 U.S. at 105. Florida may reasonably conclude that the problem of undue influence and appearance of corruption in the case of judges is a more acute problem than in the case of executive and legislative branch officers.

> (2) Petitioner argues that Canon 7C(1) does not prohibit judicial candidates from learning the identity of persons who contribute to their campaigns –

The ability of the candidate to learn the identities of contributors does not undercut the effectiveness of the Canon. Pursuant to the plain language of the Canon, the relationship is between the contributor and the third

party money-raiser, not the candidate, and the money contributed is managed by an independent committee of responsible persons, not the candidate. Fla. Code of Jud. Conduct, Canon 7C(1). While the candidate may learn the identity of a contributor, the contributor does not know at the time the contribution is made whether the candidate will learn of the contribution. Moreover, the candidate does not know whether the contribution was actually attributable to a relationship between the contributor and the third party money-raiser. Canon 7C(1) breaks the link between the contributor and the candidate even more effectively than contribution limits.

> (3) Petitioner argues that Cannon 7C(1) does not prohibit candidates from requesting non-monetary help from supporters –

This same argument could have been made with respect to the statutory provisions upheld in *Buckley* and *McConnell*, all of which were related to monetary contributions to candidates, but made no effort to restrict non-monetary assistance. *See Buckley*, 424 U.S. at 36-37. If the Canon had applied to requests for non-monetary assistance, it is likely Petitioner would have argued that it was overinclusive. The State could reasonably have concluded that the probability of corruption and the appearance of corruption in *quid pro quo* relationships was more pronounced in the case of monetary contributions than voluntary labor. It is not unreasonable to believe that a judge is more likely to be influenced by a contribution of money than by holding signs and licking envelopes.

Petitioner poses a series of questions designed to show that Canon 7C(1) creates a judicially unmanageable standard.[2] The questions are based upon the mistaken assumption that Canon 7C(1) requires a judge to determine on a case-by-case basis whether there is an appearance of bias. Canon 7C(1) does not require any such determination. Appearance of bias is simply one of the legitimate justifications for the regulation. A finding is not necessary because, as this Court has already determined, the possibility of corruption and resulting appearance of bias is inherent in the *quid pro quo* relationship engendered by contributions directly to, or solicitations directly from a judicial candidate. Furthermore, Canon 7C(1) has existed in Florida since 1973, *see In re The Fla. Bar Code of Judicial Conduct*, 281 So. 2d 21 (Fla. 1973), and the same or similar codes have been adopted in over 30 other states. *See Williams-Yulee*, 138 So. 3d at 386 n.2. Yet, there is no evidence that it has been judicially unmanageable.

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2. "Appearance of bias to whom—participants in the legal system or citizens at large?; Must the appearance of bias be based on the views of the relevant audience in possession of all of the pertinent facts (*e.g.*, other protections against biased decisionmaking) or would it suffice if there were an appearance of bias based on uninformed or erroneous views of the pertinent facts?; How widely must the perception of bias be held within the target 'audience' for its prevention to qualify as a compelling interest?; How would courts undertake the 'appearance' inquiry—based on their own perceptions or based on evidence such as public opinion polls?" Pet'r's. Br. at 16.

III. CANON 7C(1) IS SUFFICIENTLY NARROWLY DRAWN TO MEET FIRST AMENDMENT REQUIREMENTS.

Canon 7C(1) places no restriction on the ability of the candidate or the candidate's supporters to engage in free expression. Moreover, the burden on the candidate's ability to raise money is minimal. The Canon expressly permits the candidate to "establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign," and specifies that, "[s]uch committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law." Fla. Code of Judicial Conduct, Canon 7C(1). Presumably, any viable candidate will have sufficient support to be able to establish such a committee. In *Buckley*, the Court found the existence of similar opportunities for free expression and association to be evidence of narrow tailoring:

> The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions the narrow aspect of political association where the actuality and potential for corruption have been identified while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and

> effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

Buckley, 424 U.S. at 28-29; *see also McConnell*, 540 U.S. at 139-140 (similar discussion). The statement applies as well to Canon 7C(1).

Petitioner argues that Canon 7C(1) is overinclusive because it prohibits solicitations by judicial candidates even when they are by "mass mailing" or through speeches to "large gatherings." Petitioner fails to suggest a more narrow workable standard than Canon 7C(1), no doubt because anything other than a prophylactic ban on solicitation would create the very unmanageability that Petitioner decries. At what point does a mailing become sufficiently "mass" to eliminate *quid pro quo* concerns? How many persons make an audience "large" enough to eliminate those concerns? There is no way to draw a meaningful line, and the Florida Supreme Court's decision to simply prohibit all direct solicitations by judicial candidates is a reasonable resolution.

In *Buckley*, the Court rejected a similar argument that a $1,000 limit on campaign contributions was overinclusive because much more would be necessary to result in improper influence:

> Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "(i)f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000

> ceiling might not serve as well as $1,000." Such distinctions in degree become significant only when they can be said to amount to differences in kind.

Buckley, 424 U.S. at 30 (citation omitted).

Petitioner makes the conclusory statement that Canon 7C(1) does not entail only a marginal restriction on contributors' free expression, as the Court in *McConnell* found to be the case with contribution limits. But Petitioner makes no effort to explain why this is so. As discussed above, Canon 7C(1) allows judicial candidates the same freedom of expression as was noted in *McConnell*.

Petitioner argues that recusal and contribution limits would be reasonable substitutes for the ban on solicitations. The problem with recusal for bias resulting from a campaign contribution is that the determination is highly subjective and the decision is largely left to the judge who received the contribution and is subject to constitutional challenge in only "rare instances." *Caperton*, 556 U.S. at 890. The potential for corruption and the appearance of corruption remains. In addition, a recusal requirement would place lawyers in the unreasonable position of having to desist from financially supporting the campaigns of judges they consider the most worthy or disqualifying those judges from presiding over their cases.

The decision by Congress to utilize contribution limits in the statutes upheld in *Buckley* and *McConnell* does not mean that such limits are the only constitutionally permissible approach, particularly when the restrictions in Canon 7C(1) tread no more heavily on the candidates'

freedom of expression than do the contribution limits. Here, again, *Buckley* disposed of a materially equivalent argument:

> Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and suspected quid pro quo arrangements." But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in the opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

Buckley, 424 U.S. at 27-28.

* * * * *

Over the past 38 years, this Court has fashioned a body of jurisprudence on a case-by-case basis that sets the parameters of government regulations intended to balance competing constitutional interests in the field of campaign finance. Through all of those cases, one principle has

remained constant. In the field of campaign finance, states may pass narrowly tailored provisions to regulate both ends of the *quid pro quo* equation. Canon 7C(1) embraces that principle and complies with the First Amendment jurisprudence in all respects. The Canon was designed to balance two fundamental constitutional rights: the right of a candidate to free speech; and the right of a litigant to due process, which would be threatened by corruptly influenced judges or by the loss of public confidence in the integrity of the judiciary. Canon 7C(1) effectively serves the latter interest while placing minimal burden on the former.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 13-1499

In the Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner Lanell Williams-Yulee was punished for signing a form letter that both requested support and solicited campaign contributions, and for posting the signed letter on her campaign website. There were no face-to-face requests for contributions and no personalized written requests. The First Amendment prevents Florida from imposing sanctions for that conduct.

Respondent and its *amici* focus principally on explaining how judicial impartiality is threatened by direct, face-to-face solicitation by sitting judges. But they say virtually nothing about why a form letter and web posting could have that effect. That failure is understandable. Particularly in the context of Florida's campaign finance regulations—which permit contributions to judicial candidates; permit candidates to know who is solicited, who donated, and who did not; and permit candidates to write thank-you notes to donors—there is no credible basis for concluding that prohibiting form letters and web postings is sufficiently related to judicial impartiality to permit the State to ban that speech.

First, Canon 7C(1)'s ban on candidate solicitations is a content-based regulation of speech, subject to strict scrutiny review. This Court's precedents make clear that the more relaxed "closely drawn" standard developed in the context of limits on campaign contributions may not be applied to assess the constitutionality of an across-the-board ban on solicitations by candidates.

Second, the ban cannot be justified as an anticorruption measure. To begin with, any link between a ban on candidate solicitation of lawful contributions

and prevention of *quid pro quo* corruption is too attenuated to satisfy strict scrutiny. Even if there were a sufficient link between the anticorruption interest and the ban on solicitation, moreover, the regulation is not narrowly tailored. Neither respondent nor its *amici* provide a single example of corruption resulting from the sending of a mass-mailed letter or the posting of a request for campaign contributions on a website—and they cannot explain how prohibiting those actions would materially reduce a threat of corruption.

Third, the State's interest in preserving judicial impartiality also cannot justify the across-the-board ban. The arguments advanced by respondent's *amici* focus on the risk posed by campaign contributions—they do not explain how an across-the-board ban on solicitation of contributions by a candidate protects against the risk of bias given the existence of the contributions themselves. At most, the impartiality interest might be implicated when judicial candidates engage in face-to-face solicitation—neither respondent nor its *amici* even attempt to explain how or why the same concern is implicated by form letters and web postings. The regulation therefore is not narrowly tailored.

Fourth, the solicitation ban cannot be upheld based on a state interest in protecting lawyers and others from a judge's use of her authority to coerce campaign contributions. Form letters and web postings are not coercive—this state interest too is implicated only by face-to-face solicitation.

In sum, petitioner was punished for engaging in speech protected by the First Amendment. The finding of wrongful conduct and accompanying sanctions therefore must be reversed.

A. Strict Scrutiny Review Applies.

Canon 7C(1) is a content-based speech regulation. It applies when a candidate's communication "solicit[s] campaign funds," whether orally or in writing. Because the regulation is based on the content of the candidate's speech, it is subject to review under the strict scrutiny standard. Pet. Br. 11-12. That is the test applied by the court below. Pet. App. 7a ("in order to be constitutional and not in violation of the First Amendment, Canon 7C(1) must be narrowly tailored to serve a compelling state interest").

Respondent and some *amici* contend that the Court should instead apply the "closely drawn" scrutiny standard. This Court's precedents require rejection of that contention.

To begin with, both standards require state regulation to satisfy a heavy burden: "regardless whether [the Court] appl[ies] strict scrutiny or *Buckley*'s 'closely drawn' test, [the Court] must assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon* v. *FEC*. 134 S. Ct. 1434, 1445 (2014). Here, as in *McCutcheon*, the "substantial mismatch between the [State's] stated objective and the means selected to achieve it," invalidates Canon 7(C)(1) under either standard. 134 S. Ct. at 1446 (internal quotation marks omitted).

If the choice of standard could influence the outcome, however, strict scrutiny must be applied. The rationale underlying the "closely drawn" test—which was developed in the context of contribution limits—is wholly inapplicable to a complete ban on candidate solicitation of contributions that may lawfully be received by the candidate's own campaign committee.

The *Buckley* Court concluded that "contribution limits impose a lesser restraint on political speech because they 'permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and issues.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 21 (1976) (per curiam)). The Court therefore "focused on the effect of the contribution limits on the freedom of political association and applied a lesser but still 'rigorous standard of review.'" *Ibid.*

Subsequently, in *McConnell* v. *FEC*, 540 U.S. 93 (2003), the Court applied this standard to restrictions on contribution solicitations that were "adopted to implement [a] contribution limit, or to prevent circumvention of that limit." *Id.* at 138-139. One of the provisions at issue in *McConnell*, for example, banned national political parties and federal candidates from receiving "soft money" and imposed a parallel restriction on the solicitation of those funds. *Id.* at 139.

The Court held that the inclusion of restrictions on solicitation did not require application of strict scrutiny to assess the constitutionality of a combined contribution/solicitation prohibition: "for purposes of determining the level of scrutiny, it is irrelevant that Congress chose * * * to regulate contributions on the demand rather than the supply side." *McConnell*, 540 U.S. at 138. The relevant question was whether the solicitation prohibition "burdens speech in a way that a direct restriction on the contribution itself would not." *Id.* at 138-139.

McConnell recognized "'the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views.'" 540 U.S. at 140. It found that the solicitation restrictions at issue in *McConnell* left national parties and federal candidates with "ample opportunities for soliciting federal funds on behalf of entities" subject to the statutory contribution limitations. *Id.* at 139; see also *id.* at 177 (restrictions "leav[e] open substantial opportunities for solicitation and other expressive activities"); *id.* at 183 (similar observation).

The Court relied on the existence of those alternative solicitation options in upholding the solicitation restrictions: "The fact that party committees and federal candidates and officeholders must now ask only for limited dollar amounts or request that a corporation or union contribute money through its PAC in no way alters or impairs the political message 'intertwined' with the solicitation." *McConnell*, 540 U.S. at 140. Indeed, the Court determined that "the restriction here tends to increase the dissemination of information *by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors*." *Ibid.* (emphasis added).

Because the solicitation restrictions had "only a marginal impact on political speech" similar to that of direct limits on contributions, they were properly reviewed under *Buckley*'s less rigorous standard for contribution limitations. *McConnell*, 540 U.S. at 140-141. Justice Kennedy rejected the majority's approach and applied strict scrutiny review to the solic-

itation restrictions. *Id.* at 314-315 (concurring in the judgment and concurring and dissenting in part).[1]

None of *McConnell*'s justifications for reduced scrutiny apply here. Canon 7C(1) imposes a comprehensive ban on candidate solicitation: far from allowing candidates "ample opportunities" to solicit financial support, it flatly prohibits all such solicitations. Canon 7C(1) does not "implement [a] contribution limit, or * * * prevent circumvention of that limit" (*McConnell*, 540 U.S. at 138); rather, it bars candidates from soliciting contributions that are permissible under Florida law. And Canon 7C(1) does not promote solicitation by candidates from a wider array of donors, but instead bars any and all solicitation. Because requests for campaign funds are often intertwined with "informative and perhaps persuasive speech seeking support" (*McConnell*, 540 U.S. at 139-140), moreover, the restriction intrudes significantly on core First Amendment speech.

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[1] Some *amici* point to Justice Kennedy's conclusion in *McConnell* (540 U.S. at 308) that an anticorruption rationale could be sufficient to justify a solicitation restriction. *E.g.*, Public Citizen *et al.* Am. Br. 6-7. But the uncontroversial conclusion that preventing corruption is a compelling interest that *may* justify solicitation restrictions as well as contribution limits, says nothing about whether a particular solicitation restriction *is* permissible under the First Amendment. Indeed, Justice Kennedy found the anticorruption rationale insufficient to justify some of the restrictions at issue in *McConnell* (540 U.S. at 298-307) and found those same provisions insufficiently tailored to satisfy strict scrutiny (*id.* at 314-317). In upholding one restriction as narrowly tailored, Justice Kennedy emphasized that "it does not ban all solicitation by candidates, but only their solicitation of soft-money contributions; and it incorporates important exceptions to its limits." *Id.* at 314.

McConnell thus provides no support for application of the relaxed *Buckley* "contribution" standard. Its rationale instead confirms that strict scrutiny is the proper test.

Respondent's invocation (Br. 6) of the Court's decision in *FEC* v. *National Right to Work Committee*, 459 U.S. 210 (1982), is similarly unavailing. In that case, which involved claims grounded in the right of association, the Court did not specify whether it was applying strict scrutiny or some other test. But the Court's analysis rested to a large degree on the challenged regulation's applicability to corporations. *Id.* at 208-210; compare *Citizens United* v. *FEC*, 558 U.S. 310 (2010) (rejecting that approach). That factor is not present here.

Some of respondent's *amici* advocate reduced scrutiny on a different rationale, contending that requests for contributions receive reduced protection under the First Amendment. Conference of Chief Justices Am. Br. 23-24; Dorsen *et al.* Am. Br. 10-13. But this Court has repeatedly subjected limitations on charitable solicitations to strict scrutiny review. *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 789, 792 (1988); *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). Surely the same standard applies to solicitations relating to the political activity that is the core concern of the First Amendment.[2]

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[2] Some *amici* argue that requests for campaign contributions do not qualify as core protected speech. But what could be more core than requesting the funds needed to campaign for elective office? Any campaign can be silenced if it cannot obtain financial support. The *McConnell* Court's explanation of the linkage between contribution solicitations and a candidate's substantive messages (540 U.S. at 139-140) confirms that conclusion.

In sum, this content-based restriction is subject to strict scrutiny review.

B. The Prohibition Is Not Justified By the State's Interest In Preventing Corruption.

Respondent relies exclusively on the government interest in preventing *quid pro quo* corruption or its appearance. Resp. Br. 1-3. That is a compelling government interest. But the critical questions are, *first*, whether that interest is materially promoted by an across-the-board prohibition against solicitations by candidates; and, *second*, whether applying the prohibition in that context is narrowly tailored to serve that government interest. Respondent's argument fails on both counts.

Some risk of *quid pro quo* corruption is inherent in Florida's regulatory plan. The fact that contributions to judicial candidates' campaigns are permitted provides a means for a *quid*: A corrupt candidate can ensure compliance with any illegal plan because he or she will know who has contributed to the campaign and who has not. And a corrupt "contributor" can be sure that the judicial candidate is aware of the contribution because thank-you notes to contributors are permitted. Pet. Br. 18-20. Given those realities, respondent cannot—and does not—explain how preventing candidates from requesting lawful contributions, taken alone, materially advances the interest in preventing corruption.

The same interest in preventing corruption extends to every other category of elected official. But respondent cannot point to any other situation in which a candidate is barred from soliciting contributions that may lawfully be donated to her campaign.

That is because the anticorruption interest is not advanced by such a prohibition.[3]

The polls cited by respondent (Br. 9-10) prove the point. Respondent says (*id.* at 9) that "campaign contributions" are "having an undue influence." It is the candidate's knowledge of who contributions (and who does not) that creates the public concern, not the identify of the solicitor.

Respondent relies (Br. 6-8) on this Court's decision in *McConnell*, asserting that the portion of that ruling upholding solicitation prohibitions as measures preventing *quid pro quo* corruption also governs here. But the solicitation prohibitions in *McConnell* were limited—they barred national parties or candidates from soliciting contributions in amounts or from sources that could not be donated to the party or to the candidate's committee. They thus prevented circumvention of contribution limitations that were valid under the First Amendment as anticorruption measures. See pages 4-6 & note 1, *supra*.

Here, by contrast, candidates are prohibited from soliciting contributions that may lawfully be made to their campaign committees. *McConnell*'s anticircumvention rationale is therefore wholly inapplicable.[4]

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[3] Respondent states (Br. 14) that the Florida Supreme Court has no authority to regulate other branches of the state government. But that does not explain why respondent cannot provide even a single example of adoption by a state legislature of such an across-the-board restriction outside the judicial context.

[4] Respondent is mistaken in asserting (Br. 7-8) that one of the provisions upheld in *McConnell*—Section 323(e)—was not an anticircumvention provision. It prohibits candidates from soliciting a category of support, soft money, that may not lawfully be donated to candidates' committees. 52 U.S.C. § 30125(e).

Moreover, *McConnell*'s determination that these restrictions did not violate the First Amendment specifically rested on the fact that candidates could solicit contributions for their own committees. See page 5, *supra*. Respondent's reliance on *McConnell* is thus misplaced.

Finally, respondent contends that solicitation of contributions by third parties eliminates the "direct link between the contributor and the candidate that creates the potential for *quid pro quo* corruption and the appearance of corruption." Br. 10-12; *see also id.* at 14-15. That simply is not true: the contribution goes directly to the candidate's committee. If anything, the solicitation ban serves only the cosmetic effect of concealing the direct link between contributor and candidate that continues to exist.

The portion of this Court's decision in *McCutcheon* on which respondent relies (Br. 8-9) illustrates the distinction. There, the Court contrasted direct donations to a candidate's committee with donations to another candidate, or to a party committee or PAC, that are "subsequently re-routed" to the candidate's committee. 134 S. Ct. at 1452. Because the rerouting "occurs at the initial recipient's discretion—not the donor's," the risk of *quid pro quo* corruption is reduced. *Ibid.*

Here, of course, the donation is made directly to the judicial candidate's committee—the solicitor has no power to direct it elsewhere. *McCutcheon*'s discussion of a reduced risk of corruption is therefore irrelevant.

Respondent's argument, if accepted, would mean that candidates for *any* elective office could be barred from soliciting contributions. The anticorruption in-

terest extends to all elected officials—if that interest is sufficient to permit an across-the-board prohibition for judicial candidates, it would suffice to permit a ban for any other candidate for public office. That result is inconsistent with the Court's reasoning in *McConnell*.

Finally, even if there were a sufficient link between the anticorruption interest and the ban on solicitation, the regulation is not narrowly tailored. All of the examples of corruption cited by respondent's *amici* involve face-to-face conduct—principally bribes. Harding *et al.* Am. Br. 8-10. Neither respondent nor its *amici* provide a single example of corruption resulting from the sending of a mass-mailed letter or the posting of a request for campaign contributions on a website. The anticorruption rationale cannot justify application of Canon 7C(1) here.

C. Application Of Canon 7C(1) Is Not Supported By The Interest In Protecting Impartiality And Its Appearance.

Respondent's *amici* assert that the State's interest in an impartial judiciary supports the application of Canon 7C(1) here. That interest may qualify as compelling, but it fails to satisfy the strict scrutiny standard here.

First, as with the anticorruption interest, it is difficult to see how the solicitation ban protects impartiality given the other aspects of Florida's judicial campaign finance regime.

The arguments advanced by respondent's *amici* focus on the adverse impact of campaign contributions on judicial impartiality and its appearance. Professors of Law, Economics, and Political Science Am. Br. 14 ("the research suggests, and many judges

agree, that the source and amount of campaign contributions to candidates for judicial office can affect judicial decision-making and case outcomes" and that "the rigors of running for judicial office can affect judicial decision-making"); Public Citizen, *et al.* Am. Br. 12-14.

These *amici* do not explain how an across-the-board ban on solicitation of contributions by a candidate, protects against the risk of bias given the existence of the contributions themselves. They simply state in conclusory fashion that Canon 7C(1) "shelters judges from the influence that personally politicking for campaign contributions might have on their decision-making." Professors of Law, Economics, and Political Science Am. Br. 19. But when the candidate still receives contributions, knows who gave and who didn't, writes thank-you notes, and can herself solicit non-monetary support, the "shelter[]" is illusory. Pet. Br. 18-20.

As another of respondent's *amici* asserts, the likely justification for an across-the-board ban is protecting the "dignity" of the judiciary. Free Speech for People *et al.* Am. Br. 4-25. Although an important concern, that goal does not rise to the level of a compelling interest sufficient to justify restrictions on core political speech. Indeed, this Court rejected very similar arguments in *White*. See 536 U.S. at 783-84.

Second, the impartiality interest could be implicated only when judicial candidates engage in face-to-face solicitation. Indeed, all of the examples of threats to impartiality or its appearance cited by respondent's *amici* involve exactly that—and principally face-to-face solicitation by sitting judges of lawyers who appear before them. Shugerman Am.

Br. 14-19; ABA Am. Br. 5-6; Public Citizen *et al.* Am. Br. 17-18.[5]

Other than conclusory assertions of a threat to impartiality, no one involved in this litigation has yet explained how or why the same concern is implicated by form letters and web postings. Several of respondent's *amici* candidly acknowledge that the government interest in this context is substantially more attenuated. *E.g.*, Phillips *et al.* Am. Br. 4 n.2 ("the most pernicious problems come when there is private oral or written solicitation by a candidate to a specific potential donor"); Conference of Chief Justices Am. Br. 15 n.3 (observing that the stated concerns "*may* apply to mass mailings as well as to direct in-person solicitation") (emphasis added).

Indeed, respondent and its *amici* recognize this distinction by referring repeatedly to the prohibition of "direct" personal solicitation by candidates. *E.g.*, Resp. Br. 1, 11 n.1, 16, 18; Conference of Chief Justices Am. Br. 3-6, 13-25; Public Citizen *et al.* Am. Br. 3, 5, 15. The Florida regulation does not include that limiting word, and characterizing a form letter and web posting as "direct" stretches the meaning of that word beyond all recognition. If Florida prohibited only "direct" solicitation, its prohibition would not apply on the facts here.

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[5] The experiences of the former Chief Justices of the Supreme Courts of Texas and Alabama took place in States with *no* limits on solicitation by candidates, and therefore provide no support for Florida's determination that any solicitation threatens impartiality. Indeed, the examples cited by the former Chief Justices all involve face-to-face solicitation far removed from the form letter and website posting at issue here. Phillips *et al.* Am. Br. 15-17.

Because the impartiality interest is not threatened by form letters and web postings, the across-the-board prohibition fails the narrow tailoring requirement, and its application to petitioner's actions is impermissible under the First Amendment.

That conclusion is supported by the availability of recusal as an alternative for situations exempted from the solicitation prohibition. Respondent's *amici* argue that recusal cannot fully substitute for a solicitation restriction. *E.g.*, Conference of Chief Justices Am. Br. 26-28; Public Citizen *et al.* Am. Br. 20-22. But availability of recusal as an alternative means of protecting impartiality in circumstances in which solicitation is permitted further supports the conclusion that narrower tailoring is required.

Narrower tailoring of the restriction is also necessary because the across-the-board rule trenches on important First Amendment interests. As this Court has observed, "'solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views.'" *McConnell*, 540 U.S. at 139-140. The Court upheld the solicitation restrictions at issue there only because they left national parties and federal candidates, personally, with "ample opportunities for soliciting" the contributions that parties and candidate committees could lawfully receive. *Id.* at 139. That is not true here: candidates are barred completely from soliciting contributions that their committees may receive.

Moreover, neither respondent nor its *amici* address the significant concern that Florida's broad prohibition—like many restrictions on campaign-related speech—disproportionately favor incumbents and the well-connected: "incumbent judges (who ben-

efit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." *Carey* v. *Wolnitzek*, 614 F.3d 189, 204 (6th Cir. 2010). Respondent simply "[p]resum[es]" (Br. 17) that "any viable candidate will have sufficient support to be able to establish" a committee to solicit contributions effectively. While that presumption may apply to "establishment" candidates, there is no reason at all to believe that it applies to insurgents. This consideration, too, therefore requires Florida to utilize a more narrowly tailored rule.

Third, respondent's *amici* point to the adoption by a significant number of States of an across-the-board ban on contribution solicitations, asserting that the identical decision by those States is entitled to deference. *E.g.*, ABA Am. Br. 20; Conference of Chief Justices Am. Br. 28-29. But this Court rejected the very same argument in *White*, holding that the uniform adoption by the States of the speech ban at issue in that case provided no basis for ignoring the restriction's failure to satisfy the strict scrutiny standard. 536 U.S. 785-88.[6]

Fourth, respondent and its *amici* argue that a categorical prohibition is necessary because a less comprehensive ban would present insuperable line-drawing problems.

However, the regulations of other States demonstrate that more tailored restrictions are feasible.

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[6] Other *amici* argue that the Court should defer to the States because of their authority to regulate lawyers. Again, that argument is inconsistent with the Court's holding in *White*.

Several States have adopted regulations that permit form letters and web postings and focus the prohibition on those circumstances that could give rise to a threat to impartiality. Minn. Code of Jud. Conduct, Canon 4.2(B)(3) (permitting form letters and in-person requests to groups of 20 people); Mo. Code of Jud. Conduct, Canon2-4.2(B) (permitting form letters); N.D. Code of Jud. Conduct, Rule 4.6 (permitting form letters and in-person requests to groups of 25 people); Ohio Code of Jud. Conduct, Rule 4.4(A)(1) (permitting form letters and in-person requests to groups of 20 people).

D. Any State Interest In Preventing Coercion Is Inapplicable Here.

Some of respondent's *amici* assert that the solicitation ban furthers a state interest in protecting lawyers and others from a judge's use of her authority to coerce campaign contributions. Conference of Chief Justices Am. Br. 18-25; Dorsen *et al.* Am. Br. 13. That interest, although compelling in the abstract, provides no basis for upholding the across-the-board ban under strict scrutiny.

To begin with, the prohibition applies in myriad situations in which there is no possibility of coercion:

- Requests conveyed through form letters or a post on a website or at a large gathering;
- Requests directed to non-lawyers unlikely to appear as parties before the candidate;
- Requests directed to lawyers unlikely to appear before the candidate, because they practice in other communities or States or because they are not litigators.

As Judge Sutton observed for the Sixth Circuit, "indirect methods of solicitation" like "speeches to large groups and signed mass mailings" "present little or no risk of undue pressure." *Carey*, 614 F.3d at 205. After all, "[n]o one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge." *Ibid.* The same is true of speeches "to large assemblies of voters." *Republican Party of Minnesota* v. *White*, 416 F.3d 738, 765 (8th Cir. 2005). As one commentator has put it, "it is difficult to see how the candidate's signature on [a] fund-raising letter, perhaps with a short P.S., is any more 'coercive' than the same letter, with a 'Candidate for Judge' letterhead, signed by the chair of the committee, who everyone knows was chosen by the candidate"; and "it stretches the concept of coercive almost beyond recognition to forbid a candidate from [soliciting financial support from] the 500 assembled voters." Alan H. Morrison, *Judges and Politics: What to Do and Not to Do about Some Inevitable Problems*, 28 Just. Sys. J. 283 (2007).

Amici cite several federal statutes that prohibit solicitations by candidates, but each is much more narrowly tailored to cover only those situations in which coercion could be present. *E.g.*, 18 U.S.C. § 602 (prohibiting knowing solicitation of federal employees by members of Congress). The ban on solicitations directed at federal contractors (see 52 U.S.C. § 30119) relates to contributions that are unlawful; it therefore resembles the solicitation restrictions upheld in *McConnell* on a rationale inapplicable to

solicitations of contributions that lawfully may be received by the candidate's committee.[7]

A prohibition against soliciting lawyers and parties appearing before a judge surely could be justified on this basis; and the rationale might extend to direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate. But it provides no basis for upholding Canon 7C(1)'s across-the-board restriction.[8]

E. The Court Should Reverse The Judgment Below On The Ground That Petitioner's Conduct Was Protected By The First Amendment.

Some *amici*, but not respondent, argue that—if the Court concludes that petitioner's conduct is protected by the First Amendment—the Court should hold only that Canon 7C(1) is invalid as applied to petitioner and not invalid on its face. Conference of Chief Justices Am. Br. 29-34.

Petitioner's interest here is to vindicate her own First Amendment rights by overturning the determi-

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[7] The Hatch Act's restrictions apply to federal employees (see 5 U.S.C. § 7323), not candidates, and therefore infringe different First Amendment interests and fall under the different, and more limited, First Amendment constraints applicable to restrictions on government employees' speech. The same is true of restrictions on judges' activities other than activities relating to a judge's own election.

[8] Some *amici* advocate "preservation of political equality" as an interest justifying the solicitation ban. Dorsen *et al.* Am. Br. 12. But, as *amici* themselves recognize (*id.* at 14-15), the Court has already rejected that interest as a justification for restrictions on speech. There is no basis for a different result here.

nation that she engaged in improper conduct and the imposition of public disciplinary sanctions, including the assessment for court costs. See Pet. 5-8. Holding Canon 7C(1) invalid either as applied or on its face would accomplish that end.[9]

Even if the Court were to hold the regulation invalid as applied, however, Florida and other States with similarly-broad restrictions would presumably wish to move quickly to revise those restrictions in accordance with this Court's opinion. Otherwise, a significant amount of speech protected by the First Amendment could be chilled by maintaining in place prohibitions that encompass large categories of constitutionally-protected speech.

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[9] *Amici* assert that facial invalidation is not an option here because petitioner did not preserve a separate overbreadth challenge. In the First Amendment context, however, a law may be invalidated on its face "because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted). That is the case here. Petitioner is not invoking the separate First Amendment overbreadth doctrine that permits invalidation of a statute on its face even if application of the challenged regulation to the plaintiff's own conduct would not violate the First Amendment. Cf. *Bd. of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U.S. 469, 483 (1989) ("the principal advantage of the over-breadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application *to someone else*").

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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JANUARY 2015

[10] The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

AMICUS CURIAE BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Respondent. The ABA urges this Court to affirm the Florida Supreme Court and hold that Canon 7C(1) of the Florida Code of Judicial Conduct does not violate the First Amendment. Canon 7C(1) is narrowly tailored to promote the State's compelling interest in a fair and impartial judiciary free from corruption and the appearance of corruption by properly prohibiting judicial candidates from personally soliciting campaign contributions, while placing no limits on candidates' ability to communicate their views or qualifications for office, or to form campaign committees to solicit funds to support their election efforts.

The ABA is the largest voluntary professional membership organization in the United States and the nation's leading organization of legal professionals. Its nearly 400,000 members come from all fifty states, the District of Columbia, and the U.S. territories. Its voluntary membership includes attorneys in law firms, corporations, non-profit organizations, and local, state, and federal governments. Members also include judges,

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1. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has worked to protect the rights guaranteed by the Constitution, including those protected by the First Amendment. One of the ABA's continuing goals is to "[p]reserve the independence of the legal profession and the judiciary."[3] In service of that goal, the ABA formulated and, in 1924, adopted the first model rules for judges, the *Canons of Judicial Ethics*.[4]

The *Canons* were replaced in 1972 by the *Code of Judicial Conduct*. The *Code* included Canon 7B(2) which,

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2. Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

3. *ABA Mission and Goals*, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Dec. 19, 2014).

4. The *Canons* were drafted by the ABA's Committee on Judicial Ethics, which was comprised of judges, lawyers, and experts in judicial ethics, and chaired by Chief Justice William Howard Taft. CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT, p. vii (2009). The *Canons* became ABA policy only after adoption by vote of the ABA's House of Delegates ("HOD"). The HOD remains the ABA's policy-making body, and now has 560 delegates representing states and territories, state and local bar associations, affiliated organizations, and the ABA's sections, divisions, and its members, among others. *See ABA Leadership, House of Delegates - General Information*, http://www.abanet.org/leadership/delegates.html (last visited Dec. 19, 2014).

for the first time, specifically limited a judicial candidate's ability to personally solicit contributions. Canon 7B(2) stated in pertinent part:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy.

Canon 7B(2) was based on the drafters' concern that "[t]he problem of funding a campaign for judicial office probably presents the greatest of all conflicts between political necessity and judicial impartiality."[5] That is, "[i]f outside financing is permitted, then as a practical matter there are only a few sources available; most citizens are not interested in helping finance a campaign for judicial office. Those sources are the coffers of a political organization, lawyers, and those persons who are, or are likely to be, involved in litigation."[6]

The 1972 Code was revised as the *Model Code of Judicial Conduct* in 1990, which in turn was updated in 2007. Both versions of the *Model Code* retained

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5. E. WAYNE THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 98 (1973).

6. *Id.* at 99.

the solicitation ban.[7] The current ABA Model Code's solicitation ban recognizes the continuing reality that campaign fundraising can create the appearance or actuality of *quid pro quo* corruption. The ban thus focuses on removing the judicial candidate from the solicitation process by eliminating, *first*, the opportunity for the party solicited to feel obligated or "strong-armed" by the judicial candidate into making a contribution; and *second*, the potential for public perception that a party who has accepted the candidate's request has purchased the candidate's favor.[8]

Of the 39 states that use a form of elections for judicial selection, 30 have adopted a version of the ABA *Model Code's* solicitation ban.[9] This includes Florida's Canon 7C(1) at issue in this case. *The Fla. Bar v. Williams-Yulee*, 138 So. 3d 379, 385-86 (Fla. 2014); Pet. App. 11a.

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7. *See* ABA *Model Code of Judicial Conduct*, Canon 4.1, which states in pertinent part:

> "(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
>
> * * *
>
> (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4.

8. ARTHUR GARWIN ET AL., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 477 (2nd ed. 2011).

9. The Appendix provides a table identifying each state's judicial selection method and whether the state has adopted a solicitation ban.

These solicitation bans play a critical role in preserving the integrity of the judicial branch, as well as the public's perception of that integrity, which are state interests of the highest order. *Republican Party of Minn. v. White (White I)*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.").

For the following reasons, the ABA respectfully requests this Court affirm the Florida Supreme Court.

SUMMARY OF THE ARGUMENT

The ABA's personal solicitation ban, Florida's Canon 7C(1), and the similar personal solicitation bans adopted by 29 other states, support the states' compelling interest in protecting the integrity of their judicial systems. These bans are narrowly tailored to add ress the potential for corruption and the appearance of corruption of state judges by removing them from the *quid* of a potential *quid pro quo*, without limiting their ability to communicate their views and qualifications for office, or to form campaign committees to solicit funds to support their election efforts.

The concerns that motivated the adoption of these personal solicitation bans, and that support their continued enforcement, are not inchoate. In *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 368 Ark. 577, 247 S.W.3d 876 (Ark. 2007), for example, the Arkansas Supreme Court

disciplined a sitting judge who had personally called two lawyers who appeared before him (one of whom had cases pending before the judge) and asked them to contribute to his reelection campaign. The Florida Supreme Court, in this case, disciplined a lawyer who sent a personally-signed mailing asking people to contribute to her judicial campaign. These two cases lie within the continuum of direct solicitation conduct by judicial candidates. Without the ban in place, these and other personal solicitations will not only be permissible, but will also become commonplace, compounding the current public perception that campaign contributions are affecting judicial decisions.

The First Amendment does not require this result. This Court previously upheld a similar solicitation ban in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 182 (2003), overruled in part on other grounds by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). In *McConnell*, this Court applied the "closely drawn" scrutiny it had applied to campaign contribution regulations in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). This Court should apply that reasoning here and hold that Canon 7C(1) does not violate the First Amendment.

Even if this Court were to apply strict scrutiny, however, the Florida Supreme Court should still be affirmed because Canon 7C(1) is narrowly tailored to the state's compelling interest in protecting its judiciary's integrity and does not prohibit judicial candidates from discussing their qualifications or announcing their views. It only removes candidates from the "ask."

Today, rules like Florida's Canon 7C(1) are even more important for the avoidance of the actuality and

appearance of *quid pro quo*. As the pressure to spend more on judicial campaigns increases and as interest groups become important funding sources, the bans protect against a public perception that judicial candidates are personally soliciting funds from contributors who may expect more in return than judicial competence.

States should be allowed to protect their judicial systems through campaign bans that limit only a judicial candidate's personal solicitation while serving an interest of the highest order: countering the public perception that money influences judicial decisions.

ARGUMENT

I. In Prohibiting Judicial Candidates From Personally Soliciting Campaign Contributions, Canon 7C(1) Is A Permissible Campaign Contribution Regulation That Does Not Violate The First Amendment.

a. Canon 7C(1) of the Florida Code of Judicial Conduct provides, in relevant part:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy.

Pet. App. 6-7a. *See also Williams-Yulee*, 138 So. 3d at 385.

By its plain language, Canon 7C(1) does not limit judicial candidates' political speech. They remain free to put forward their qualifications for office and their positions on issues, whether in person or by mail. Nor does it limit contributions that can be made to judicial candidates. It regulates only the solicitation of those contributions by requiring that such solicitations be made by campaign committees and not by the judicial candidates personally.

Because Canon 7C(1) does not restrict actual "speech," it should be analyzed under the "closely drawn" scrutiny standard, rather than under strict scrutiny. However, even under the strict scrutiny analysis that the Florida Supreme Court applied, Pet. App. 10a, *Williams-Yulee*, 138 So. 3d at 384, its narrow personal solicitation ban does not violate the First Amendment.

b. In *McConnell*, this Court upheld a similar solicitation ban that barred federal candidates and officeholders from soliciting soft money in connection with federal elections because "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all the same corruption concerns posed by contributions made directly to the candidate or officeholder." *McConnell*, 540 U.S. at 182. The *McConnell* Court thus applied the "closely drawn" scrutiny review that it had applied to campaign contribution regulations in *Buckley*. *Id.* at 141-42.

The *Buckley* Court had recognized that states have a compelling interest in preventing corruption or the appearance of corruption in elections through campaign finance regulation. The Court stated that "the appearance of corruption stemming from public awareness

of the opportunities for abuse inherent in a regime of large individual financial contributions" was "[o]f almost equal concern as the danger of actual quid pro quo arrangements." *Buckley*, 424 U.S. at 27. Concluding that contribution limits impose a lesser restraint on political speech, the *Buckley* Court applied the less rigorous "closely drawn" scrutiny. *Id.* at 25. Likewise, the *McConnell* Court concluded that strict scrutiny should not be applied to the soft-money solicitation ban.

Applying *Buckley*, the *McConnell* Court concluded that a legitimate interest "extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" *McConnell*, 540 U.S. at 150, quoting *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001). The danger that officeholders would decide issues based on the desires of contributors, and not on the merits or wishes of their constituents, was just as troubling as *quid pro quo* corruption. *McConnell*, 540 U.S. at 153. Because this danger "is neither easily detected nor practical to criminalize[, t]he best means of prevention is to identify and remove the temptation." *Id.* The *McConnell* Court also stated that "it is irrelevant that Congress chose ... to regulate contributions on the demand rather than the supply side." *McConnell*, 540 U.S. at 138.

Republican Party of Minn. v. White (White I), 536 U.S. 765 (2002), is not to the contrary. In *White I*, this Court applied strict scrutiny to Minnesota's "announce clause," because that canon prohibited judicial candidates from expressing their views on legal and political issues that might come before the court. *White I*, 536 U.S. at

768. Further, that canon regulated judges "only when and because they are candidates." *Id.* at 796 (Kennedy, J., concurring). A candidate could "say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected." *Id.* at 779-80.

Unlike the announce clause at issue in *White I*, Canon 7C(1) does not burden speech that is "'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." *White I*, 536 U.S. at 774. Further, the limitation imposed by Canon 7C(1) applies any time the request is for a campaign contribution, but limits only requests made by the person who is or will be the judicial candidate. Canon 7C(1), therefore, should be considered under the "closely drawn" scrutiny review that this Court applied to campaign contribution regulations in *McConnell*.

c. Florida's personal solicitation ban survives *McConnell*'s "closely drawn" standard. The interest identified in *McConnell*—that officeholders would decide issues not on the merits or their constituents' wishes but, instead, because of donations made "at a candidate's or officeholder's behest," *id.* at 182—is even more compelling in the context of our judicial system, with its fundamental postulate that cases be decided on their merits, and not based on the identity of the litigants or their lawyers.

Canon 7C(1) is properly aimed at eliminating the pressures of appeasing donors from whom a judicial candidate has personally asked for a contribution. And the pressure to appease a donor may be present even when that donor is not a litigant before the judge, if

the judge's decision will nevertheless benefit or hinder the interests of the non-party donor. Barring judicial candidates from personally soliciting contributions avoids even the appearance of this kind of *quid pro quo* simply by removing judicial candidates from asking for the *quid*.

Successful judicial candidates sitting as judges may know that a lawyer or party appearing before them contributed to their campaigns, and may, of course, feel a debt of gratitude toward these contributors. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 882 (2009). But it is one thing to feel a debt of gratitude because of a contribution, and another thing for the judge to know that the contribution was made by that litigant because of the judge's personal request—a request that the litigant may well have felt she could not refuse. *See McConnell*, 540 U.S. at 303 (Kennedy, J., dissenting) ("one of the handful of Senators on whom the Government relies to make its case candidly admits the pressure of appeasing soft-money donors derives from the Members' solicitation of donors, not from the donors' otherwise giving to their party.").

The fact that Petitioner's solicitation was a mailing, rather than an in-person solicitation, does not change the analysis. Even a printed mass-mailed request for contributions coming from a judge or judicial candidate is likely to have a profound effect on a litigant or lawyer who appears before, or is interested in a matter before, the judge. A mass-solicitation letter may avoid the intimacy of a personal request, but applying the ban to all forms of personal solicitation is a "valid anticircumvention measure[,]" *McConnell*, 540 U.S. at 182, that avoids the need for fact-specific determinations as to whether any particular litigant or lawyer was or felt coerced by any

particular contribution request. It avoids the necessity of determining, for instance, whether a small-volume "mass mailing" is actually a personal letter directed to specific potential donors, or to people known to represent well-funded potential donors, who are included among the recipients. Additionally, the objective ban avoids the difficulty of distinguishing whether a campaign event should be considered a large mass event or, for example, one for several dozen carefully chosen potential donors.

The solicitation ban on judicial candidates was imposed by the Florida Supreme Court, the entity responsible for the ethical regulation of Florida's judicial branch. In *McConnell*, the Court stated that applying the "closely drawn" scrutiny standard to the solicitation ban at issue showed "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *Id.* at 137. The Florida Supreme Court, similarly, has weighed the competing constitutional interests, including the due process concerns, that are implicated by personal solicitations for contributions in Florida judicial campaigns. *See Caperton*, 556 U.S at 885 ("Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true[,]" quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). In fact, every state supreme court that has considered whether its solicitation ban violates the First Amendment has held it does not. *See Williams-Yulee*, 138 So. 3d at 384 (citing *Simes*, 247 S.W.3d at 881; *In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003); *In re Fadeley*, 310 Or. 548, 802 P.2d 31, 41 (Or. 1990)).

This Court should apply *McConnell's* "closely drawn" scrutiny standard and conclude that Canon 7C(1)'s personal solicitation ban is closely drawn to avoid the appearance of *quid pro quo* corruption by removing the judicial candidate from the fundraising process. Balancing Florida's interest in judicial integrity against a judicial candidate's ability to personally solicit campaign contributions weighs heavily in the State's favor.

II. Even Under The Strict Scrutiny Standard, Canon 7C(1) Is The "Rare Case" That Survives.

Even under the rigorous strict scrutiny standard, Canon 7C(1)'s personal solicitation ban presents "the rare case in which...a law survives[.]" *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

To survive strict scrutiny, Canon 7C(1) must (1) be narrowly tailored to (2) serve a compelling state interest. *White I*, 536 U.S. at 774-75. Florida Canon 7C(1) satisfies both requirements. There is no question Florida has a compelling interest in a fair and impartial judiciary free from the appearance of corruption. Every court to apply strict scrutiny to a similar solicitation ban has found the states have a compelling interest in the appearance and actuality of an impartial judiciary. *See, e.g., Wolfson v. Concannon*, 750 F.3d 1145, 1156 (9th Cir. 2014). And, as discussed above, Canon 7C(1) is narrowly tailored because it does not "unnecessarily circumscrib[e] protected expression." *White I*, 536 U.S. at 775 (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)). It limits only a judicial candidate's ability to personally solicit campaign contributions.

The solicitation at issue in this case was a solicitation letter personally signed by Petitioner. This Court has upheld bans on solicitation letters for campaign contributions under *quid pro quo* concerns. *Fed. Election Comm'n v. Nat'l Right To Work Comm.*, 459 U.S. 197, 210 (1982). This Court has also recognized the states' interest in preventing the appearance of *quid pro quo* corruption. *Buckley*, 424 U.S. at 27; *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014); *Citizens United*, 558 U.S. at 359. *See also Siefert v. Alexander*, 608 F.3d 974, 989 (7th Cir. 2010) (contributions made at a judicial candidate's request carry greater potential for the appearance of *quid pro quo* than those made at a non-candidate's request).

Canon 7C(1)'s personal solicitation ban is neither overinclusive nor underinclusive. It removes judicial candidates from the appearance of *quid pro quo*, but does not limit a candidate's ability to communicate her views or qualifications. It does not prohibit a candidate from soliciting other forms of support, like asking for votes or putting up yard signs. Nor does it bar her from sending mailings under her signature, or from giving campaign speeches to a crowd or an intimate group; it only bars the judicial candidate from including a personal request for a contribution in her campaign communications.

Petitioner is incorrect that recusal offers a less restrictive alternative to the solicitation ban. Pet. Br. 23. In the first place, recusal of judges imposes serious costs on a state's judicial system when judges become unavailable to decide cases. Second, asking judges to recuse themselves places the parties and lawyers before them in an often-confrontative position before the judge. Third, recusal often requires that a judge subjectively

determine whether a litigant's contribution has or has not resulted in bias or the appearance of bias, which can be difficult despite a judge's most sincere efforts. "[J]udges who are deeply committed to the appearance and reality of impartial justice are called upon to acknowledge in the context of specific cases, that despite their best efforts to preserve impartiality, they are either partial or appear to be so. That is a hard thing to ask of our judges."[10] *See also Caperton*, 556 U.S. at 883 ("[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules."). And, a judge's subjective conclusion as to whether the contribution resulted in actual bias or the appearance of bias does nothing to address the public perception created when a judge is asked to recuse because he personally solicited a litigant now before him for a campaign contribution. After-the-fact recusal is simply not a sufficient alternative to an objective solicitation ban.

Canon 7(1) addresses Florida's concern that personal solicitation by judicial candidates creates the perception of either actual or apparent *quid pro quo* corruption, but it does not limit the candidates' ability to communicate their views or qualifications for office, or to form campaign committees to solicit funds to support their election efforts. The rule is thus narrowly tailored to Florida's

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10. *Examining the State of Judicial Recusals after* Caperton v. A.T. Massey*: Hearing before Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 24 (2009) (statement of Charles G. Geyh, Assoc. Dean of Research, Professor of Law, Indiana Univ., Maurer Sch. of Law, Bloomington, IN), http://judiciary.house.gov/_files/hearings/printers/111th/111-118_53947.PDF (last visited Dec. 22, 2014).

compelling interest in a fair and impartial judiciary free from the appearance of corruption.[11]

III. The Cost of Judicial Elections Makes The Prohibition On Personal Solicitation By Judicial Candidates More Important Today.

In 1812, Georgia became the first state to provide for the election of judges. *White I*, 536 U.S. at 785. Today, although the forms of judicial elections vary, 39 states provide for the election of at least some of their judges. While judicial elections were once seen as sleepy affairs, they have attracted ever increasing amounts of money and attention in the past few decades, and the need for judges and judicial candidates to raise ever-increasing sums of money has had a corrosive effect on the public's perception of the integrity of our state judicial systems. "As interest-group spending rises, public confidence in the judiciary declines."[12]

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11. In *White I*, this Court left open the question of whether states may "restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct" under the rationale of *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). *White I*, 536 U.S. at 796 (Kennedy, J., concurring). *See also Wolfson*, 750 F.3d at 1163 (Berzon, J., concurring) ("I suggest that the analogy to the *Pickering* line of cases has much to commend it."). The ABA asserts that, under *Pickering*, the solicitation ban should also be upheld.

12. Justice Sandra Day O'Connor (Ret.), Opinion, *Justice for Sale: How Special-Interest Money Threatens the Integrity of Our Court*, WALL ST. J., Nov. 15, 2007, at A25.

As revealed in a 2009 Gallup poll, 89 percent of voters believed that the influence of campaign contributions on a judge was a problem.[13] Equally troubling is a 2002 poll, in which 46 percent of state court judges polled believed campaign donations had at least "a little influence" on judicial decisions.[14]

And the effect campaign contributions have on the public's perception of judicial integrity and independence is a concern no longer limited to states that hold partisan, contested judicial elections, but extends to states that hold non-partisan, uncontested elections as well. For example, despite Iowa's adoption of the Missouri plan for merit selection of its supreme court justices—a system designed to "reduce[] threats to judicial impartiality," *White I*, 536 U.S. at 791 (O'Connor, J., concurring)—three Iowa supreme court justices were defeated in an uncontested retention election in 2010 after an out-of-state group mounted an anti-retention campaign that focused on the justices' votes in a single, unanimous opinion.[15]

If the solicitation ban is invalidated, judges facing retention or reelection, having the benefit of the Iowa example, may well begin to build their campaign coffers by personally asking for contributions from those likely to support a decision, perhaps as soon as the decision is rendered. Moreover, when faced with a controversial

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13. Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA Today, Feb. 16, 2009.

14. Greenberg Quinland Rosner et al., Justice At Stake - State Judges Frequency Questionnaire, Q. 12 at 5 (2002).

15. Grant Schulte, *Iowans Dismiss Three Justices*, Des Moines Register, Nov. 3, 2010.

decision, judges may consider the potential level of campaign financial support—for or against them as candidates.

If this happens, judges may begin to be perceived as little different from their legislative and executive branch counterparts. But while legislators and executive branch officials should be expected to consider the views of their constituents when making policy decisions, "[j]udges are not political actors. They do not sit as representatives of particular persons, communities or parties; they serve no faction or constituency. '[I]t is the business of judges to be indifferent to popularity.'" *White I*, 536 U.S. at 806 (Ginsburg, J., dissenting) (quoting *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991)). Furthermore, judicial races, unlike legislative and executive races, have due process implications. *See Caperton*, 556 U.S. 868.

As the pressure to spend more on judicial campaigns increases, rules like Florida's Canon 7C(1), which restrict a candidate's ability to personally ask for campaign contributions, become more important in the avoidance of the actuality and appearance of *quid pro quo*. The amount of money spent on judicial races more than doubled between the 1990s and the first decade of the 21st century.[16] And in the 2014 election cycle, spending on television advertising in state supreme court races increased by $2 million from 2010.[17] As discussed above, when adopting *Code of Judicial*

16. *Campaign Spending and the Courts*, JUSTICE AT STAKE, http://www.justiceatstake.org/resources/in_depth_issues_guides/caperton_resource_page/campaign-spending-and-the-courts/ (last visited Dec. 19, 2014).

17. Joseph Tanfani, *Judicial Elections Getting More Political with New Campaign Spending*, LA TIMES, Nov 23, 2014,

Conduct in 1972, the ABA concluded that most citizens were not interested in helping finance a campaign for judicial office, and that the sources for judicial campaign finances were "the coffers of a political organization, lawyers, and those persons who are, or are likely to be, involved in litigation."[18] Today, however, large out-of-state groups must be added as important sources, and without the personal solicitation ban, judicial candidates are likely to be faced with the decision of whether to personally solicit them for contributions, regardless of the effect on public perception.

Whether judicial elections are the best form of judicial selection is a topic that has been the subject of much debate, and the debate will no doubt continue after this case has been decided. "[T]he struggle to balance independence and accountability has played itself out over the course of more than two centuries [resulting in] distinct methods of selecting judges—each striking a balance in different ways."[19] But 39 states have chosen some form of elections to select at least some of their judges.[20] And those states have the right to make that choice, for it is "[t]hrough the

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http://www.latimes.com/nation/politics/la-na-judicial-elections-20141123-story.html#page=1 (last visited Dec. 19, 2014).

18. *See* discussion in Interest of the *Amicus Curiae* Section, supra at 5, quoting E. Wayne Thode, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 99 (1973).

19. Charles G. Geyh, *The Endless Judicial Selection Debate And Why It Matters For Judicial Independence*, 21 Geo. J. Legal Ethics 1259, 1261 (2008).

20. *See* Appendix, which provides a table identifying each state's judicial selection method and whether the state has adopted a solicitation ban.

structure of its government, and the character of those who exercise governmental authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

The ABA does not, "even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor,'" *White I*, 536 U.S. at 796 (Kennedy, J., concurring) (quoting *Bridges v. Cal.*, 314 U.S. 252, 273 (1941)). Still, the fact remains that "[t]he power and the prerogative of a court to perform [its] function rest[s], in the end, upon the respect accorded to its judgments." *White I*, 536 U.S. at 793 (Kennedy, J., concurring); *see also Bauer v. Shepard*, 620 F.3d 704, 712 (7th Cir. 2010) ("The judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and adverts vigilantism and civil strife.").

Florida's Canon 7C(1) and the similar personal solicitation bans adopted by 29 other states are consistent with the First Amendment in their limitation of only the personal solicitation of campaign funds by judicial candidates. The choice of these narrowly tailored vehicles to protect the integrity of their judicial branches by avoiding the appearance of corruption, therefore, should be left to the states to make. As this Court has stated, "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Gregory*, 501 U.S. at 457 (quoting *Tex. v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869)).

The personal solicitation ban embodied in Florida's Canon 7C(1) should be upheld.

CONCLUSION

For the reasons set out above, *amicus curiae* American Bar Association respectfully requests this Court affirm the judgment of the Florida Supreme Court.

Dated: December 24, 2014

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APPENDIX

APPENDIX — STATE VARIATIONS OF PROHIBITIONS OF PERSONAL SOLICITATION OF CAMPAIGN CONTRIBUTIONS

STATE VARIATIONS OF PROHIBITIONS OF PERSONAL SOLICITATION OF CAMPAIGN CONTRIBUTIONS

AL

Alabama elects its judges. Judges are discouraged, but not prohibited from soliciting campaign contributions for their election.

Canon 7(A)(1) reads:

It is desirable that a judge or a candidate for election to judicial office endeavor not to be involved in the internal workings of political organizations, engage in campaign activities in connection with a political candidate other than a candidate for a judicial office and not be involved in political fund solicitations other than for himself or herself. However, so long as judges are subject to nomination and election as candidates of a political party, it is realized that a judge or a candidate for election to a judicial office cannot divorce himself or herself completely from political organizations and campaign activities which, indirectly or directly, may be involved in his or her election or re-election. Nevertheless, should a judge or a candidate for a judicial position be directly or indirectly involved in the internal workings or campaign activities of a political organization, it is imperative that he or she at all times conduct himself or herself in a manner as to prevent any

political considerations, entanglements, or influences from ever becoming involved in or from ever appearing to be involved in any judicial decision or in the judicial process.

Canon 7(B)(4)(a) reads:

A candidate is strongly discouraged from personally soliciting campaign contributions. It is highly recommended that a candidate establish committees of responsible persons to solicit and accept campaign contributions, to manage the expenditure of funds for the candidate's campaign, and to obtain public statements of support for his or her candidacy. Such committees may solicit and accept campaign contributions and public support from lawyers.

AK

Alaska uses merit selection and retention elections to select their judges. The Alaska Judicial Council screens applicants and the governor appoints judges. Judges stand for retention election. Canon 5(C)(3) prohibits personal solicitation. It provides:

A judge who is a candidate for retention in judicial office shall not personally solicit or accept any funds to support his or her candidacy or personally solicit publicly stated support for his or her candidacy. However, if there is active opposition to the judge's candidacy, the judge's election committees may engage in media advertisements, brochures, mailings, candidate forums, and any other legal methods of pursuing the judge's election. Such committees

may solicit and accept reasonable campaign contributions, manage and expend these funds on behalf of the judge's election campaign and solicit and obtain public statements of support for the judge's candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers.

AZ

The Arizona judiciary is composed of three courts of general jurisdiction--the supreme court, the court of appeals, and the superior court. Appellate judges and superior court judges in Maricopa and Pima Counties are chosen through merit selection. After an initial two-year term, judges must stand for retention. Superior court judges in smaller counties are chosen in nonpartisan elections.

Arizona Rule 4.1(A)(6) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

AR

Arkansas elects its judges in a non-partisan election.

Arkansas Code of Judicial Conduct, Rule 4.1(A)(8) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

Appendix

CA

In California, the governor nominates supreme court judges and court of appeal judges who must then be confirmed by the commission on judicial appointments. Appellate judges must stand for retention. Superior court judges are chosen in nonpartisan elections.

Judges are not prohibited from personally soliciting campaign contributions for their elections. The Advisory Committee Commentary to Canon 5(A) of the Code of Conduct explains:

In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone, including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. In soliciting campaign contributions or endorsements, a judge shall not use the prestige of judicial office in a manner that would reasonably be perceived as coercive. See Canons 1, 2, 2A, and 2B. Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(6), a judge's campaign may receive attorney contributions.

CO

Colorado judges are appointed by the governor and stand for retention after serving two years. They are prohibited from personally soliciting campaign contributions by

Appendix

Rule 4.1(A)(8) of the Colorado Code of Judicial Conduct. Additionally, Rule 4.3 provides:

(A) A judge who is a candidate for retention in office should abstain from any campaign activity in connection with the judge's own candidacy unless there is active opposition to his or her retention in office. If there is active opposition to the retention of a candidate judge:

* * * * *

(3) a nonpartisan citizens' committee or committees advocating a judge's retention in office may be organized by others, either on their own initiative or at the request of the judge;

(4) any committee organized pursuant to subsection (A)(3) may raise funds for the judge's campaign, but the judge should not solicit funds personally or accept any funds except those paid to the judge by a committee for reimbursement of the judge's campaign expenses;

(5) the judge should not be advised of the source of funds raised by the committee or committees;

CT

Judges are appointed in Connecticut.

DE

Judges are appointed in Delaware.

Appendix

DC

Judges are appointed in the District of Columbia.

FL

While appellate judges are appointed in Florida, trial judges are elected. Canon 7(C)(1) prohibits judges who stand for election from personally soliciting campaign funds.

GA

Georgia judges are elected in non-partisan elections. They may personally solicit campaign contributions and publicly stated support. However, in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), they are encouraged to establish campaign committee of responsible persons to secure and manage the expenditure of funds for their campaigns and to obtain public statements of support of their candidates.

HI

Judges are appointed in Hawaii.

ID

Idaho judges are elected in non-partisan elections. They are prohibited from personally soliciting campaign contributions by Canon 5(C)(2).

Additionally, "a candidate's judicial election committee should not disclose the names of contributors to judicial campaigns and judicial candidates and judges should avoid obtaining the names of contributors to the judicial campaign."

IL

Illinois elects its judges in partisan elections, while retention elections are non-partisan. Canon 67(B)(2) prohibits a judge from personally soliciting campaign contributions.

IN

In Indiana, appellate court judges are appointed by the governor and trial court judges are elected in partisan elections. Four counties in Indiana have opted to either non-partisan elections or merit selection to select judges of trial courts created by statute.

Indiana's Rule 4.1(A)(8) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

IA

Iowa judges are appointed by the governor and voters decide whether to retain them.

Rule 51:4.1(A)(8) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

Appendix

KS

In Kansas, a nominating commission is used to appoint supreme court judges, appellate court judges are appointed by the governor, and trial court judges may be selected through the merit system or elected as decided by the district.

Judges may solicit campaign contributions per *Yost v. Stout*, No. 06-4122-JAR, 2008 WL 8906379 (D. Kan. Nov. 16, 2008), which struck down Kansas's prohibition on personally soliciting campaign contributions. These clauses were omitted when the code was amended in 2009.

KY

Kentucky elects its judges in non-partisan elections. In *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010), the U.S. Court of Appeals for the Sixth Circuit found Kentucky's solicitation clause and the party affiliation clause unconstitutional.

LA

Louisiana elects its judges and judges are prohibited from personally soliciting campaign contributions per Canon 7(A)(6). Comment [2] to Canon 7 explains, "A judge or judicial candidate is prohibited from personally soliciting or personally accepting campaign contributions, but is not prohibited from knowing the identities of his or her campaign contributors. A judge or judicial candidate's campaign committee, but not the judge or judicial

candidate, may send thank you notes to the judge or judicial candidate's campaign contributors."

ME

In Maine, judges are nominated by the governor and confirmed by the senate for both initial and re-appointment.

MD

In Maryland, the governor appoints and the senate confirms appellate judges. Appellate judges then run for retention. Trial court judges are elected in non-partisan elections. The Maryland Code of Judicial Conduct does not prohibit candidates from personally soliciting or accepting contributions.

MA

Massachusetts appoints its judges.

MI

Michigan elects its intermediate and trial court judges in non-partisan elections. Supreme court judges are elected in partisan elections. Judges are prohibited from personally soliciting campaign contributions in Canon 7(B)(2)(a).

MN

Minnesota elects its judges in non-partisan elections.

Appendix

Until 2005, the Minnesota Code of Judicial Conduct prohibited judges from personally soliciting campaign contributions. That year and again in 2010, the U.S. Court of Appeals for the Eighth Circuit struck down Minnesota's canon because it's scope was not narrowly tailored. Petitioners sought to personally solicit large groups, send letter sent over the candidate's signature, and conduct door-to-door solicitation of non-lawyers.

Minnesota Code of Judicial Conduct provides in Rule 4.2(B) provides: A candidate for elective office may, unless prohibited by law:

* * * * *

(3)(a) make a general request for campaign contributions when speaking to an audience of 20 or more people;

(b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate;

Minnesota Rule 4.4(B)(3) provides: A judicial candidate subject to public election shall direct his or her campaign committee not to disclose to the candidate the identity of campaign contributors nor to disclose to the candidate the identity of those who were solicited for contribution and refused such solicitation. The candidate may be advised of aggregate contribution information in a manner that does not reveal the source(s) of the contributions.

Appendix

MS

Mississippi elects its judges in non-partisan elections. Judges in Mississippi are prohibited from personally soliciting campaign contributions by Canon 5(C)(2).

MO

Missouri uses merit selection to appoint its judges. Judges stand for retention election and in some circumstances may personally solicit and accept campaign contributions.

Missouri Rule 2-4.2(B) explains: "A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not solicit or accept campaign funds in a courthouse or on courthouse grounds. Such candidate shall not solicit in person campaign funds from persons likely to appear before the judge. A candidate may make a written campaign solicitation for campaign funds of any person or group, including any person or group likely to appear before the judge."

Additionally, paragraph (C) of the same Rule notes: "(C) An incumbent judge who is a candidate for retention in or reelection to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in Rule 2-4.2(B)."

Appendix

MT

Montana elects its judges in non-partisan elections. The Montana Code of Judicial Conduct does not prohibit a judge or judicial candidate from personally soliciting campaign contributions.

NE

In Nebraska judges are appointed by the governor and stand for retention election.

Nebraska Rule 4.1(A)(8) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

NV

Judges are elected in Nevada in nonpartisan elections.

In Nevada, a judge who is opposed in an election may personally solicit and accept campaign contributions under Rule 4.2(B)(4), and unopposed candidate may not personally or through a campaign committee solicit or accept contributions.

NH

In New Hampshire, the executive council appoints judges based on nominations from the governor and selection commission.

Appendix

NJ

In New Jersey, judges are selected by the governor and approved by the state senate. Reappointment is a similar process.

NM

In New Mexico, the governor appoints judges to fill judicial vacancies. These judges then stand for election, which are partisan. Judges are retained in retention elections.

In Rule 21-402(B) of the New Mexico Code, judges are prohibited from "campaign fund-raising activity which has the appearance of impropriety, and shall not accept any contribution that creates an appearance of impropriety."

Rule 21-402(C) explains that the candidates may personally solicit contributions for their own campaign, but not for the campaign of others. Rule 21-402(E) prohibits judges from personally soliciting or accepting campaign contributions from lawyers or litigants with pending cases before the judge. A campaign committee may solicit lawyers with matters pending, but may not solicit litigants with matters pending.

Additionally, all lawyer and litigant contributions must be made to the campaign committee not the candidate.

The campaign committee may not disclose to the candidate the identity or source of campaign funds raised.

Appendix

NY

The majority of judges serving New York state are elected in partisan elections. Trial court judges are selected by delegates to a party convention.

New York's Rule 100.5(A)(5) of the Rules Governing Judicial Conduct notes "A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law."

NC

In North Carolina, judges are elected in publicly-funded, non-partisan elections. Canon 7(B)(4) provides that a judge or candidate may "personally solicit campaign funds and request public support from anyone for his own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds."

ND

Supreme and district court judges are elected in non-partisan races. Judges facing election are prohibited from personally soliciting and accepting campaign contributions. Rule 4.6 prohibits a judge from "directly

and personally solicit or accept campaign contributions or directly and personally solicit publicly stated support."

OH

Judicial candidates run in primary elections to secure a place on a non-partisan ballot in Ohio.

While the Ohio Code of Judicial Conduct does prohibit candidates and judges from personally soliciting campaign contributions in Rule 4.4(A), exceptions to this rule include:

(1) A judicial candidate may make a general request for campaign contributions when speaking to an audience of twenty or more individuals;

(2) A judicial candidate may sign letters soliciting campaign contributions if the letters are for distribution by the judicial candidate's campaign committee and the letters direct contributions to be sent to the campaign committee and not to the judicial candidate;

(3) A judicial candidate may make a general request for campaign contributions via an electronic communication that is in text format if contributions are directed to be sent to the campaign committee and not to the judicial candidate.

OK

District court judges are elected in Oklahoma and the governor appoints appellate court judges based on the

recommendation of the nominating commission. All stand for retention election.

Oklahoma's Rule 4.1(A)(8) prohibiting judges and judicial candidates from personally soliciting or accepting campaign contributions mirrors ABA Model Rule 4.1(A)(8).

OR

Oregon voters elected their judges in non-partisan elections. Candidates and judges are prohibited from personally soliciting or accepting campaign contributions by Rule 5.1(E) which reads: "Except as permitted by law, a judge or judicial candidate shall not personally solicit or accept campaign contributions other than through a lawfully established campaign committee except, so long as the procedures employed are not coercive, a judge or judicial candidate may personally solicit or accept campaign contributions from members of the judge's family and judges over whom the judge does not exercise supervisory or appellate authority."

PA

Judges are elected in partisan elections in Pennsylvania. Pursuant to new Rule 4.1(A)(7) of Pennsylvania's Code of Judicial Conduct, candidates and judges are prohibited from personally soliciting or accepting campaign contributions.

Appendix

RI

In Rhode Island a nominating commission recommends judicial appointments to the governor. The governor's selection must be confirmed by the house and senate.

SC

In South Carolina, a judicial merit selection commission makes recommendations for appointment to the South Carolina legislature.

SD

The governor appoints appellate court judges in South Dakota; trial court judges are elected in non-partisan elections.

Canon 5(C)(2)(c) provides: "A judicial candidate subject to public election may personally solicit campaign contributions from members of the judge's family, from a person with whom the judge has an intimate relationship, or from judges over whom the judge does not exercise supervisory or appellate authority."

TN

Tennessee's hybrid system of judicial selection means that appellate court judges are appointed by the governor based on the recommendation of a nominating commission. Lower court judges are elected in partisan elections.

Appendix

Tennessee's Code of Judicial Conduct, Rule 4.1(A)(8) prohibits a judge or candidate from personally soliciting or accepting campaign contributions.

TX

Texans elect their judiciary in partisan elections. Canon 4(D)(1) of Texas' Code of Judicial Conduct permits judges to solicit "funds for appropriate campaign or officeholder expenses as permitted by law."

UT

The governor in Utah recommends a candidate for judicial office based on the recommendation of a nominating commission. The governor's selection must be confirmed by the state senate. Appointed judges stand for retention.

Rule 4.2(B) of Utah's Code notes that a judge who is facing opposition in a retention election, the judge may campaign for office. A judge may not personally solicit or accept campaign contributions.

VT

In Vermont, the governor appoints judges based on the recommendation of a nominating commission. Judges must be retained by the general assembly. Probate and assistant judges are elected. They are prohibited from personally soliciting or accepting campaign contributions under Canon 5(C)(3).

Appendix

VA

In Virginia, judges are elected by the Virginia legislature.

WA

In Washington, judges are elected in non-partisan elections. Washington Code of Judicial Conduct, Rule 4.1(A)(7) prohibits judges and candidate from personally soliciting or accepting campaign contributions "other than through a campaign committee authorized by Rule 4.4, except for members of the judge's family or individuals who have agreed to serve on the campaign committee authorized by Rule 4.4 and subject to the requirements for campaign committees in Rule 4.4(B)."

WV

Judges are elected in partisan races in West Virginia. Judges and candidates are prohibited from personally soliciting or accepting campaign contributions pursuant to Canon 5(C)(2).

WI

Wisconsin's voters select judges in non-partisan elections. Candidates and judges are prohibited from personally soliciting or accepting campaign contributions by Supreme Court Rule 60.06(4).

Appendix

WY

In Wyoming, judges are appointed by the governor and, then, must be retained by the voters. Only if the judge faces active opposition in the retention race, may the judge campaign. The judge may not personally solicit or accept campaign contributions under Rule 4.2(B)(4).

AMICUS CURIAE BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF FLORIDA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles embodied in the Bill of Rights. Since its founding in 1920, the ACLU has been deeply involved in securing the free speech rights embodied in the First Amendment. In support of that central organizational goal, the ACLU has appeared before this Court in numerous free speech cases both as direct counsel and as *amicus curiae*. The ACLU of Florida is a statewide affiliate of the national ACLU.

The ACLU takes no position on the propriety of an elected as opposed to an appointed judiciary. However, it strongly believes that if a state does provide for popular election of judges, campaign speech by candidates for judicial office, like campaign speech by candidates for other offices, is entitled to the highest degree of First Amendment protection.

STATEMENT

Florida, like 39 other States, has chosen to select judges by popular vote; and like nearly every such State, enforces a rule prohibiting judicial candidates from personally soliciting campaign contributions. Specifically, Florida Code of Judicial Conduct Canon 7C(1) prohibits candidates for judicial offices filled by election (including incumbent judges) from "person-

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[1] All parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and its counsel made a monetary contribution to the preparation or submission of this brief.

ally" soliciting campaign funds, or publicly stated support from attorneys, while allowing instead the establishment of committees of responsible persons to secure and manage expenditures of funds for the candidate's campaign and/or to obtain public statements of support.

Petitioner Lanell Williams-Yulee, a judicial candidate in Hillsborough County, Florida, drafted and signed a mass-mail letter announcing her candidacy and seeking campaign contributions shortly after registering as a candidate. Pet. App. 31a-32a. Above the candidate's signature, the letter sought an "early contribution of $25, $50, $100, $250, or $500, made payable to 'Lanell Williams-Yulee Campaign for County Judge'" to "help raise the initial funds needed to launch the campaign and get our message out to the public." *Id.* 32a. This letter drew a complaint against petitioner in the Supreme Court of Florida, alleging a violation of Canon 7C(1). *Id.* 2a.

Upon referral to a referee, a recommended finding of guilt was entered, *id.* 19a-30a, though with recognition that Williams-Yulee's violation arose from a good-faith mistake interpreting the Canon. *Id.* 28a. The referee recommended a public reprimand and payment of costs of the disciplinary proceedings. This was based on Williams-Yulee's lack of prior disciplinary history and the absence of dishonest or selfish motives in sending the letter, and on timely and good faith efforts to rectify the misconduct, and full cooperation with the disciplinary board. *Id.* at 22a-24a.

The Florida Supreme Court upheld the referee's findings of fact and recommendation of guilt, as well

as its recommended discipline. *Id.* 15a, 18a. In doing so, it rejected Williams-Yulee's contention that such application of Canon 7C(1) violated her rights to free speech as a judicial candidate. *Id.* 7a-15a. Though the court acknowledged the Canon "clearly restricts a judicial candidate's speech" and therefore "must be narrowly tailored to serve a compelling state interest," it found a compelling state interest in preserving the integrity of, and maintaining public confidence in, an impartial judiciary. *Id.* 7a. The court found the Canon narrowly tailored as "personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impartiality." It also found that separate fundraising committees provide "ample alternative means for candidates to raise the resources necessary to run." *Id.* at 11a, 15a.

The court observed that Canon 7C(1) is similar to Canons 4.1(A)(8) and 4.4 of the ABA Model Code of Judicial Conduct, that a majority of states have similar provisions, and that "every state supreme court that has examined" the issue held these types of provisions constitutional. *Id.* 11a-13a. At the same time, it acknowledged, federal courts, "whose judges have lifetime appointments and thus do not have to engage in fundraising," "are split." *Id.* 13a n.3. Specifically, the Sixth, Eighth, Ninth, and Eleventh Circuits have held such Canons violate the First Amendment, while the Third and Seventh Circuits have held them to be constitutional, as have the highest courts of Arkansas, Oregon and, now, Florida.

SUMMARY OF ARGUMENT

While *Amici* take no position on the use of elections to seat state court judges, once a state chooses elections, it must honor this Court's admonition that: "If the State chooses to tap the energy and legitimizing power of the democratic process, it must accord [] participants in that process ... the[ir] First Amendment rights[.]" *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). States "cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech." *Id.* at 795 (Kennedy, J., concurring).

By prohibiting candidates for judicial offices filled by election from personally soliciting campaign funds or publicly stated support of attorneys, Canon 7C(1) of Florida's Code of Judicial Conduct directly limits candidate speech. While this invites strict scrutiny, Canon 7C(1) is unconstitutional as applied to the facts of this case – regardless of what standard of First Amendment review applies – because the fit between the state's objective and the means selected to achieve it unnecessarily abridges free speech. In *Amici*'s view, it is unnecessary to go any further to reverse the decision below.

Canon 7C(1) is a poor instrument for furthering substantial government interests in preserving the reality (or appearance) of judicial integrity as applied to the facts of this case. It over-inclusively prohibits a broad array of solicitations presenting no legitimate cause for concern of undue influence such as Petitioner's mass mailing here. At the same time, it is under-inclusive in permitting solicitation by committee proxies while still allowing (a) candidates to

know who contributes (and who balks) and (b) the electorate to know who benefits from contributions. There is no logical fit, let alone narrow tailoring, between the government's interest behind the restriction on Petitioner's speech and the means the Florida Bar selected to further it.

Judicial integrity can meanwhile be advanced less restrictively and more efficiently than under Canon 7C(1). A state can, for example, enact narrowly tailored bans on solicitation focused on one-on-one solicitation of parties in cases pending or imminently before the court, where risks of undue influence may be more present. An adequate system of public financing can replace a system of private fund-raising. Absent public financing, contribution limits have been adopted in Florida and elsewhere and can be enforced. Disclosure mandates can also deter corruption and avoid the appearance of corruption by exposing contributions to public scrutiny. A recusal rule can similarly ensure impartiality, without infringing a judge's or judicial candidate's right to free speech.

ARGUMENT

PROHIBITING JUDICIAL CANDIDATES FROM MAKING MASS FUNDRAISING APPEALS VIOLATES THE FIRST AMENDMENT

A. Selecting Judges by Election Requires the Exercise of Free Expression

1. Most States Use Some Form of Judicial Elections

Methods of selecting state court judges vary widely among the states but generally fall within five broad categories – executive appointment, legislative appointment, nonpartisan election, partisan election, and merit selection. ABA, *Judicial Selection: The Process of Choosing Judges* (June 2008) ("*Judicial Selection*") at 5. Most states use some form of election to select and/or retain judges. *Id.* at 7.

Like many states, Florida uses more than one system of judicial selection. It uses a form of merit selection, the "Missouri Plan," for appointment of judges to the state Supreme Court and the District Courts of Appeal,[2] while vacancies to circuit and

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[2] Under the "Missouri Plan," the governor appoints candidates to the bench who have been recommended by a nonpartisan commission. Judges selected by this method periodically stand for retention elections. *See* American Judicature Society, Methods of Judicial Selection: Florida (http://www.judicialselection.us/judicial_selection/index.cfm?state=FL); American Judicature Society, History of Reform Efforts: Florida (http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=FL).

county courts are filled by popular election. Fla. Const., Art. V., Sec. 10.

Although most states use some form of judicial elections, this practice runs counter to the federal system in which judges are appointed by the President and confirmed for lifetime tenure by the Senate. U.S. Const., Art II, Sec. 2, cl. 2. The federal system is predicated on insulating judges from the electoral process. Arguments for this form of selection or for other types of merit-based appointment include the need to distance judges from popular passions, to provide a check on majoritarian excesses, and to protect judges from both the reality and perception of favoritism that may arise from political campaigning. *See, e.g., Judicial Selection* at 8-9; Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L. J. 43 (2003). *See generally* Report of the ABA Commission on the 21st Century Judiciary, JUSTICE IN JEOPARDY (July 2003).

Beginning in the Nineteenth Century, most states moved toward some form of judicial elections. *White*, 536 U.S. at 787 ("By the time of the Civil War, the great majority of States elected their judges."). Arguments supporting judicial elections include providing a more democratic check on the judiciary and adding a measure of popular accountability for its decisions. Advocates of elections reject the notion that appointment of judges or merit selection removes political influence from the process but merely replaces electoral politics "with *a somewhat subterranean process of bar and bench politics*, in which there is little popular control." *E.g.*, Michael DeBow, Diane Brey, Erick Kaardal, John Soroko, Frank

Strickland, and Michael B. Wallace, THE CASE FOR PARTISAN JUDICIAL ELECTIONS (Jan. 1, 2003) (emphasis in original); Chris Bonneau and Melinda Gan Hall, IN DEFENSE OF JUDICIAL ELECTIONS 2 (2009) ("elections generally are one of the most powerful legitimacy-conferring institutions in American democracy").

2. Regulation of Electoral Speech Entails First Amendment Scrutiny

The purpose of this discussion is not to advocate for or against using the electoral process to select state court judges. That is a matter for the states to decide, and *Amici* take no position on that question. But once made, the choice to have judges stand for election necessarily implicates the right of free expression. Indeed, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *E.g.*, *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Thus, "[i]f the State chooses to tap the energy and legitimizing power of the democratic process, it must accord the participants in that process ... the First Amendment rights that attach to their roles." *White*, 536 U.S. at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). *See also Meyer v. Grant*, 486 U.S. 414, 424-25 (1988) (the greater power to end voter initiatives does not include the lesser power to prohibit paid petition-circulators).

Like every other state, Florida may decide whether or not to elect all or some of its judges. Subject to basic requirements of due process, it may define those characteristics that it believes exemplify

judicial excellence and codify those definitions in its code of judicial conduct. And to protect judicial integrity it may adopt other measures, such as recusal standards more rigorous than due process requires. *White*, 536 U.S. at 794 (Kennedy, J., concurring). But the state does not have a free hand to limit candidate speech without satisfying First Amendment scrutiny. Simply put, "[t]he State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech." *Id.* at 795.

The proposition that a system of judicial elections inherently brings the First Amendment into play has been well-tested in Florida. In *Concerned Democrats of Florida v. Reno*, 458 F. Supp. 60 (S.D. Fla. 1978), the court enjoined a law that barred political parties from supporting, endorsing, or assisting judicial candidates. A little more than a decade later, in *ACLU v. The Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990), the district court enjoined a provision of the judicial code that barred judicial candidates from announcing their views on disputed legal or political issues – a proposition this Court addressed in *White*. And in *Zeller v. The Florida Bar and Florida Judicial Qualifications Comm'n.*, 909 F. Supp. 1518 (N.D. Fla. 1995), the district court voided other provisions of Canon 7C(1) that prohibited judicial candidates from spending funds or establishing committees to solicit contributions or support earlier than one year before the general election.

These same constitutional principles govern the resolution of this case. In the nearly two decades since *Zeller* was decided, this Court repeatedly has

made clear that the government cannot limit speech by candidates – including judicial candidates – without satisfying rigorous First Amendment scrutiny. *White*, 536 U.S. at 781 ("the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head") (emphasis in original). *See Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817-18 (2011); *Davis v. FEC*, 554 U.S. 724, 737-39 (2008); *Randall v. Sorrell*, 548 U.S. 230, 241 (2006).

B. Canon 7C(1) of the Florida Code of Judicial Conduct Does Not Serve to Protect Judicial Integrity as Applied Here

This case tests the constitutionality of a different restriction in Canon 7C(1) that was not addressed in *Zeller*: the prohibition on direct fundraising appeals by judicial candidates.[3] But if the district court at that time had been presented with the application of Canon 7C(1) presented here – a mass fundraising appeal – it likely would have held application of that restriction unconstitutional as well, and for the same reason: the government "wholly failed to establish a sufficient nexus between the interest [it] is trying to further – preventing the actuality or appearance of corruption – to the blanket prohibition on solicitation

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[3] The district court in *Zeller* described the prohibition on candidate solicitation at issue here as less restrictive than the provisions it struck down. *Zeller*, 909 F. Supp. at 1527. But the court neither analyzed nor ruled on the constitutionality of the candidate solicitation ban.

and collection of judicial campaign contributions." *Zeller*, 909 F. Supp. at 1526.

1. Strict Scrutiny Applies to First Amendment Review of Canon 7C(1)

Because Canon 7C(1) imposes a direct restriction on Petitioner's speech, the appropriate standard of First Amendment review is strict scrutiny. The Court applies that demanding test in cases involving the solicitation of funds, *see, e.g., Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789, 792 (1988), and the same standard logically applies here. Just like "[c]haritable appeals for funds, on the street or door to door," the type of mass appeal in this case "involve[s] a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment." *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Accordingly, Canon 7C(1) can survive only if it serves a compelling interest and employs the least restrictive means to do so. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2003).

There is no question that judicial integrity is "a state interest of the highest order." *White*, 536 U.S. at 793 (Kennedy, J., concurring). But it is not enough for the state to identify an abstract interest that all may agree is compelling. It must demonstrate that its speech restriction directly advances that interest in a narrowly tailored way – without unduly sacrificing free expression.

"[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (citation omitted). That includes speech that furthers a campaign for political office. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). Under those circumstances, the decision of the Florida Bar to discipline Petitioner for a mass mailing that sought campaign contributions well below the statutorily prescribed limits can and should be analyzed under a standard of review that is as protective of First Amendment values as that applied in the *Riley* and *Schaumburg* line of solicitation cases.

Ultimately, though, the question whether strict scrutiny applies does not matter on these facts because Canon 7C(1) is unconstitutional as applied to this case under any standard of First Amendment review. As the Court recently explained, "regardless of whether we apply strict scrutiny or *Buckley's* 'closely drawn' test, we must assess the fit between the state government objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). "[I]f a law that restricts political speech does not 'avoid unnecessary abridgement' of First Amendment rights ... it cannot survive 'rigorous' review." *Id.* at 1446.

2. Canon 7C(1) is Unconstitutional As Applied Here Under Any Standard of First Amendment Review

In a wide variety of contexts involving different standards of review, this Court has consistently rejected speech restrictions that do little to advance the government's asserted interest – whether in the context of regulating advertising, *e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), entertainment, *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), or expressive activity on public property. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Regulations that have little more than a symbolic value "diminish the credibility of the government's rationale for restricting speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994).

In the context of this case, Canon 7C(1) is a poor instrument for furthering the substantial government interest in preserving the reality (or appearance) of judicial integrity. This is underscored by both its over-inclusiveness and its under-inclusiveness.

First, the rule was invoked in this case to punish a solicitation by the Petitioner that was far removed from the special contexts (such as in-chambers or other in-person solicitations of litigants) in which there is legitimate cause for concern about undue influence.[4] More generally, Canon 7C(1) categori-

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[4] Petitioner apparently received no contributions in response to her mass mailing, Pet. Br. 23, highlighting the attenuated nature of any claim of coercion or undue influence on these facts.

cally prohibits a broad array of solicitations, including "speeches to large groups and signed mass mailings" that "present little or no risk of undue pressure or the appearance of a quid pro quo." *Carey v. Wolnitzek*, 614 F.3d 189, 205 (6th Cir. 2010).

Second, the rule is woefully under-inclusive because it would have permitted Petitioner to solicit via proxies and agents. For example, Petitioner remains free to "establish committees of responsible persons" to secure and to manage funds and to "obtain public statements of support for ... her candidacy." Pet. App. 7a. As the Ninth Circuit explained, "if impartiality or absence of corruption is the concern, what is the point of prohibiting judges from personally asking for solicitations or signing letters, if they are free to know who contributes and who balks at their committee's request?" *Wolfson v. Concannon*, 750 F.3d 1145, 1157-58 (9th Cir. 2014).

Similarly, a campaign manager can sign a solicitation letter or place her name on a fundraising website, while Petitioner is barred from doing so. But how does removing her signature advance the interest in judicial integrity when it is no secret that Petitioner benefits from the campaign contributions? There is simply no basis for concluding that judicial integrity will suffer any more from allowing Petitioner to do *directly* what Florida allows her to do *indirectly* (via committees acting as their fundraising agents).

Third, Canon 7C(1) also is under-inclusive because, to the extent it is animated by a concern that judicial candidates may feel pressure to favor contributors in litigation that may come before them

(an obvious abuse of power independently prohibited by the Code of Judicial Conduct), nothing prevents the Petitioner from learning who donated or otherwise provided support for her campaign in response to the mass mailing at issue here (or to any similar solicitation). Nor is she prevented from expressing gratitude for those contributions. Like the rule before the Sixth Circuit in *Carey*, Canon 7C(1) "prevents judicial candidates from saying 'please, give me a donation,'" but inexplicably "does *not* prevent them from saying 'thank you' for a donation given." 614 F.3d at 205 (emphasis added). Again, there is no logical fit – much less narrow tailoring – between the relevant government interest behind the speech restriction and the restrictions imposed on Petitioner to further that interest.

Circuits that have invalidated analogous provisions appropriately recognized this. *See Wolfson*, 750 F.3d 1145; *Carey*, 614 F.3d 189; *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002). By contrast, the Seventh and Third Circuits emphasized abstract interests in judicial integrity – an interest nobody disputes – while failing to come to grips with serious shortcomings of the means chosen to advance that laudable goal. *See Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010); *Stretton v. Disciplinary Bd. of the Supreme Ct. of Penn.*, 944 F.2d 137 (3d Cir. 1991). This failure ignores the Court's command that "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley*, 487 U.S. at 791.

In sum, Canon 7C(1) as applied in this case violated the First Amendment because the Florida Bar penalized Petitioner's speech without serving any of the rule's stated purposes.

C. Judicial Integrity Could Have Been Served By Less Restrictive and More Efficient Means Than By Punishment Under Canon 7C(1)

Nothing here suggests that Florida is powerless to adopt measures to uphold judicial integrity in the context of the electoral process. This case involved direct solicitation by a candidate in the context of a mass fundraising appeal. A different concern may apply in the context of a personal fundraising appeal, where the risk of undue influence may be more present. *Compare, e.g., Bates v. Arizona State Bar*, 433 U.S. 350, 384 (1977) (holding state may not "prevent the publication in a newspaper of [attorneys'] truthful advertisement concerning the availability and terms of routine legal services" through a disciplinary rule), *with Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (holding Florida Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstood intermediate scrutiny). At least four less restrictive – and more effective – means would protect judicial integrity better than punishing Petitioner's mass-solicitation.

First, a less restrictive means to protect judicial integrity is for a state to enact a narrowly tailored solicitation clause focused on one-on-one solicitation of parties in cases pending or imminently before the court. *See Carey*, 614 F.3d at 206 ("No less impor-

tantly, we do not decide today whether a State *could* enact a narrowly tailored solicitation clause – say one focused on one-on-one solicitation or solicitation from individuals with cases pending before the court – only that this clause does not do so narrowly."); *Wolfson*, 750 F.3d at 1158 (same); *Republican Party of Minn. v. White*, 416 F.3d 738, 765 (8th Cir. 2005) (*en banc*) (ban prohibiting "candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case").

Second, "disclosure is a less restrictive alternative to more comprehensive regulations of speech" by candidates for judicial office who, like Petitioner, seek to personally solicit funds through mass appeals. *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). This Court has long recognized that a rule requiring disclosure of significant contributions to candidates for elected office can "deter actual corruption and avoid the appearance of corruption by exposing large contributions ... to the light of publicity." [5] And "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information." *McCutcheon*, 134 S. Ct. at 1460. Thus, "[t]oday, given the Internet, disclosure offers much more robust protections against corruption." *Id.* (citing *Citizens*

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[5] *Citizens United*, 558 U.S. at 67. This Court has also recognized the necessity of providing a safe harbor in situations where disclosure may create an unconstitutional chill on the support of unpopular candidates or causes. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

United, 558 U.S. at 370-71). "Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible" ever before. *Id.*

For judicial elections, specifically, disclosure rules can illuminate financial interests that may raise due process concerns requiring recusal. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (holding due process required recusal "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent"); *Bracy v. Gramley*, 520 U.S. 899, 905 (1997) ("[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case."); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (parties have a due process right to a trial with a judge who lacks any "direct, personal, substantial pecuniary interest" in the outcome). An "impartial" judge under the due process clause is one who lacks bias for or against either party in the action. *White*, 536 U.S. at 776.

Thus, *third*, "recusal is [a] least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case." *White*, 416 F.3d at 755. "Through recusal, the same concerns of bias or the appearance of bias" that Florida seeks to alleviate through non-solicitation "are thoroughly addressed without," *id.*,

"burn[ing] the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Fourth, Florida and other states are free, if they choose, to adopt a system of public financing for judicial or other elections. Even in the absence of public financing, Florida has enacted contribution limits, Fla. Stat. § 106.08(1)(a), that provide (or could provide) a more straightforward path to addressing the State's legitimate concerns about bias and corruption that purportedly formed the basis for Petitioner's disciplinary sanction in this case.[6]

CONCLUSION

A citizen's advocacy of his or her own fitness for public office is speech that lies at the core of the First Amendment. This is no less true of candidates for the bench such as Petitioner here, notwithstanding the strong interest in avoiding even appearances of impropriety. Punishing Petitioner for signing a mass appeal soliciting campaign funds trenches far too deeply on these bedrock rights. This is especially the case where the prohibition applied to Petitioner does not effectively safeguard judicial integrity that can be equally if not better served by less restrictive alternatives. For these and the reasons set forth above, *Amici* respectfully ask this Court to reverse

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[6] The Court has never addressed, and this case does not present, the independent question of whether contribution limits for judicial elections can be set lower than contribution limits for political posts because of the unique nature of the judicial role and the due process significance of judicial impartiality.

the Florida Supreme Court's decision upholding Canon 7C(1) as applied in this case.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1499

In the Supreme Court of the United States

LANELL WILLIAMS-YULEE,
Petitioner,

v.

THE FLORIDA BAR,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR THE STATES OF ARIZONA, ARKANSAS, IDAHO, INDIANA, MISSISSIPPI, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE

Amici States Arizona, Arkansas, Idaho, Indiana, Mississippi, North Dakota, Oregon, Pennsylvania, South Dakota, Vermont, and Washington adopted provisions similar to Canon 7C(1) of the Florida Code of Judicial Conduct, which prohibits judicial candidates who are subject to public election from personally soliciting campaign contributions but allows campaign committees to solicit funds on their behalf. Amici States have a fundamental interest in ensuring the accountability of judges and thus choosing to elect judges while still maintaining their constitutional duty to ensure the impartiality of the judiciary and the public's confidence in the integrity of the judiciary. In addressing the issue of judicial candidates soliciting campaign contributions from lawyers and litigants who may appear before those candidates if they are elected judges, Amici States have adopted rules that vary to some degree but the interests that they are trying to protect—judicial impartiality and the appearance of judicial impartiality—are the same and those interests are compelling. Although Amici States recognize that First Amendment principles foreclose absolute prohibition of the solicitation of campaign contributions, the States need sufficient breathing room to craft and amend rules to protect against the very real harm that would occur if they were precluded from regulating judicial candidates' solicitation of campaign contributions.

STATEMENT

1. The majority of States that have judicial elections or retention elections with active opposition prohibit judicial candidates from personally soliciting

campaign funds and require that the solicitation be conducted through a campaign committee. *See* Alaska Code of Jud. Conduct, Canon 5C(3); Ariz. Code of Jud. Conduct, Canon 4.1(A)(6); Ark. Code of Judicial Conduct, Rule 4.1(A)(8); Colo. Code of Jud. Conduct, Rule 4.1(A)(8), 4.3(A)(4); Conn. Code of Jud. Conduct, Rule 4.1(A)(4); Florida Code of Jud. Conduct Canon 7C(1); Delaware Code Jud. Conduct, Rule 4.1(A)(3); Idaho Code of Jud. Conduct, Canon 5C(2); Ill. Code of Jud. Conduct, Canon 7B(2); Ind. Code of Jud. Conduct, Canon 4.1A(8); Iowa Code of Jud. Conduct, 51:4.1A(8); Ky. Sup. Ct. R. 4.300, Canon 5B(2); La. Code of Jud. Conduct, Canon 7A(6); Me. Code of Jud. Conduct, Canon 5C(3); Mich. Code of Jud. Conduct, Canon 7B(2)(a); Minn. Code of Jud. Conduct, Rule 4.1,A(6); Miss. Code of Jud. Conduct, Canon 5C(2); Mo. MO R Bar Rule 2-4.2; Mont. Code of Jud. Conduct, R CJC Rule 4.4; Neb. Code of Jud. Conduct, § 5-304.1(A)(8); N.M. Code of Jud. Conduct, Rule 21-402; N.Y. Code of Jud. Conduct, Canon 5A(2)(i); N.D. Code of Jud. Conduct, Rule 4.6; Ohio Code of Jud. Conduct, Canon 4, Rule 4.4(A); Okla. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(8); Or. Code of Jud. Conduct, Rule 5.1E; R.I. R. S. Ct. Art. VI, Code of Jud. Conduct, Canon 5B(1); S.C. Code of Jud. Conduct, Canon 5C(2); S.D. Code of Jud. Conduct, Canon 5A(1)(e); Tenn. Rules S. Ct., Rule 10, Rules of Jud. Conduct 4.1; Utah Code of Jud. Conduct, Canon 4, Rule 4.2B(2); Vt. Code of Jud. Conduct, Canon 5C(3); Wash. Code of Jud. Conduct, Rule 4.1A(7); W. Va. Code of Jud. Conduct, Canon 5C(2); Wis. Code of Jud. Conduct, Rule 60.06(4); Wyo. Code of Jud. Conduct, Canon 4, Rule 4.2B(4).

2. This case involves Respondent the Florida Bar's complaint against Petitioner Ms. Williams-Yulee,

alleging that she personally solicited campaign contributions while she was a judicial candidate. Pet. App. 3a. The referee (akin to a magistrate) who initially considered the complaint recommended that Ms. Williams-Yulee be found guilty of violating a rule regulating the Florida Bar, which requires judicial candidates to follow the Florida Code of Judicial Conduct, including Canon 7C(1), which in turn prohibits judicial candidates from personally soliciting campaign contributions but allows them to establish a committee to solicit campaign contributions. Pet. App. 4a.

Ms. Williams-Yulee urged the Florida Supreme Court to reject the referee's finding of guilt, arguing that Canon 7C(1) violated her right to free speech. Pet. App. 6a. The court initially determined that Canon 7C(1) restricted a judicial candidate's speech and then found that it "must be narrowly tailored to serve a compelling government interest." Pet. App. 7a. The court determined that "Florida has 'a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary.'" *Id.* (quoting *In re Kinsey*, 842 So.2d 77, 87 (Fla. 2003)). The court then held that Canon 7C(1) was narrowly tailored to further those interests because it separated judicial candidates from the direct solicitation and receipt of campaign funds but allowed a separate campaign committee to engage in the task of fundraising. Pet. App. 15a.

SUMMARY OF ARGUMENT

The federal and state courts that have upheld judicial code provisions that prohibit judicial candidates from personally soliciting campaign

contributions have uniformly found that these provisions further the compelling interests of preserving judicial impartiality and the appearance of judicial impartiality—interests that this Court recognized as compelling in *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 (2002).

The type of speech that this Court found invalid in *White* is substantially different from the speech that Canon 7C(1) and similar provisions prohibit. The announce clause at issue in *White* prohibited core political speech based on its content. In contrast, Canon 7C(1) prohibits judicial candidates from personally solicitating campaign contributions but allows campaign committees to solicit campaign funds on behalf of judicial candidates. It thus marginally affects a judicial candidate's ability to inform the electorate about his or her qualifications and therefore should be reviewed under the closely-drawn scrutiny framework of *Buckley v. Valeo,* 424 U.S. 1, 15 (1976). The *Buckley* framework is also appropriate for reviewing Florida's personal solicitation prohibition because the prohibition furthers the anticorruption rationale articulated in *Buckley*.

Canon 7C(1) is narrowly tailored because it permits campaign committees to solicit funds on behalf of judicial candidates and this provides an adequate, alternative means of obtaining funding. Requiring any greater precision in personal solicitation bans is futile because absolute precision in this area is unattainable and unnecessary.

ARGUMENT

I. The Personal Solicitation Ban Is Sufficiently Tailored to Further the Compelling Interests of an Impartial Judiciary and the Appearance of an Impartial Judiciary.

A. Canon 7C(1) Furthers Compelling Interests.

This Court recognized that the interest in "preserving the impartiality of the state judiciary and the appearance of the impartiality of the state judiciary" is compelling. *White*, 536 U.S. at 775-76. The Court defined impartiality as "the lack of bias for or against either *party* to the proceeding." *Id.*

The Florida Supreme Court below and the federal and state courts that have upheld judicial code provisions that prohibit judicial candidates from personally soliciting campaign contributions have uniformly found that these provisions further the compelling interests of preserving judicial impartiality and the appearance of judicial impartiality. *See* Pet. App. 9a-10a (concluding that Canon 7C(1) furthers the compelling interests of judicial impartiality by diminishing the possibility that judges will decide issues in favor of those who financially supported their campaigns and ensuring the public's trust in the judicial system by avoiding a party's fear that judges will be influenced by those who contributed to their campaign); *Wersal v. Sexton*, 674 F.3d 1010, 1031 (2012) (en banc) (holding that Minnesota's personal solicitation ban was narrowly tailored to serve Minnesota's interests in preserving judicial impartiality and the appearance of judicial

impartiality); *Siefert v. Alexander*, 608 F.3d 974, 989 (7th Cir. 2010) (noting that "[a] contribution given directly to a judge, in response to a judge's personal solicitation of that contribution, carries with it both a greater potential for a quid pro quo and a greater appearance of a quid pro quo than a contribution given to the judge's campaign committee at the request of someone other than the judge"); *Bauer v. Shepard*, 620 F.3d 704, 710 (7th Cir. 2010) (noting that the "potential for actual or perceived mutual back scratching, or retaliation against attorneys who decline to donate . . . is the same whether or not the judge knows the potential donor's first name"); *Stretton v. Disciplinary Bd. of Sup. Ct. of Pa.*, 944 F.2d 137, 146 (3d Cir. 1991) (noting that "solicitation in person does have an effect—one that lends itself to the appearance of coercion or expectation of impermissible favoritism"); *Simes v. Ark. Jud. Discipline and Disability Comm'n*, 247 S.W.3d 876, 881 (Ark. 2007) (finding Arkansas has a "compelling interest in impartiality, as lack of bias for or against either party involved in a proceeding, where the direct solicitation of money by a judge is at issue"); *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990) (noting that the "spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary").[1]

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[1] Even the Sixth Circuit did not doubt that Kentucky's solicitation ban "serves Kentucky's compelling interest in an impartial judiciary" and "in preserving the appearance and reality of a non-corrupt judiciary," although it concluded that the ban did not meet strict scrutiny." *Carey v. Wolnitzek*, 614 F.3d 189, 204 (6th Cir. 2010).

The personal solicitation prohibition is significantly different from the announce clause, which this Court found "is barely tailored to serve [the impartiality or appearance of impartiality] interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *White*, 536 U.S. at 776. A solicitation prohibition does further the interest of impartiality and the appearance of impartiality toward particular *parties*.

B. Strict Scrutiny Does Not Apply to Canon 7C(1).

The type of speech that this Court found invalid in *White* is also substantially different from the speech that Canon 7C(1) and similar provisions prohibit. The announce clause at issue in *White* "both prohibit[ed] speech based on its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." 536 U.S. at 774 (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2002)). In contrast, Canon 7C(1) does not restrict speech about a judge's qualifications. Although it prohibits the solicitation of campaign contributions by judicial candidates themselves, it allows judicial candidates to form a campaign committee that may solicit and accept campaign contributions on behalf of the judicial candidate. Whether the judicial candidate or his or her campaign committee solicits the contributions, the judicial candidate still maintains the ability to inform the electorate about his or her qualifications. Because Canon 7C(1) does not affect judicial candidates' core speech, it should therefore be

reviewed under a less rigid standard than strict scrutiny.

Although the Florida Supreme Court did not explicitly state that it was not applying strict scrutiny or that Canon 7C(1) was content neutral, the cases on which it relied applied a less exacting scrutiny. *See* Pet. App. 7a (citing *Firestone v. News-Press Publ'g Co.*, 538 So.2d 457, 459 (Fla. 1989) (invalidating a ban on the presence of non-voters within fifty feet of polling places)); *id.* at 10a (citing *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (upholding a municipal ordinance that prohibited picketing before or about an individual's residence or dwelling)). After determining that the ordinance was content neutral in *Frisby*, the Court articulated the standard "as whether the ordinance is 'narrowly tailored to serve a significant government interest' and whether it 'leaves ample alternative channels of communication.'" 487 U.S. at 482 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *see also Firestone*, 538 So.2d at 459 (noting that "[r]estrictions on first amendment rights must be supported by a compelling governmental interest and must be narrowly drawn to insure that there is no more infringement than is necessary"). The Florida Supreme Court determined that Canon 7C(1) "is narrowly tailored because it seeks to 'insulate judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns.'" Pet. App. 15a (quoting *Simes*, 247 S.W.3d at 883). Thus, the Florida Supreme Court recognized that Canon 7C(1) was not a content-based regulation of pure speech.

In *Siefert*, the Seventh Circuit recognized that prohibiting judicial candidates from personally soliciting campaign contributions is analogous to contribution limitations and therefore governed by the closely-drawn scrutiny framework of *Buckley*, 424 U.S. at 15. 608 F.3d at 988 (noting that because Wisconsin's solicitation ban "does not restrict the amount or manner in which a judicial candidate can spend money on his or her campaign" and is at heart a campaign finance regulation, it should be reviewed under the *Buckley* framework); *see also Wersal*, 674 F.3d at 1032 (Loken, J., concurring in the judgment) (characterizing Minnesota's personal solicitation ban as a restriction that does not directly burden speech and "is part of Minnesota's regulation of judicial campaign financing"); *Stretton*, 944 F.2d at 145-46 (affirming the district court's conclusion that Pennsylvania's personal solicitation ban "was not a restriction on what could be expended for promulgating political views" and concluding that the "means currently employed are narrowly tailored to further" the compelling interest in judicial impartiality and "there are alternative, less objectionable means for raising campaign funds").[2]

The Seventh Circuit also determined that the *Buckley* framework applied because both the personal

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[2] The Oregon Supreme Court also distinguished the kind of speech involved when judges directly solicit campaign contributions from speech deserving greater protection by comparing it to the commercial speech at issue in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 458 (1978). *Fadeley*, 802 P.2d at 43. The court reasoned that "in the context of in-person solicitation of campaign funds, [there is] a certainty of an appearance of impropriety and a high degree of likelihood of overreaching or undue influence by the requesting judge." *Id.*

solicitation ban and the contribution limits upheld in *Buckley* further a "compelling state interest in preventing corruption or the appearance of corruption." *Siefert*, 608 F.3d at 988 (citing *Buckley*, 424 U.S. at 26-27). The court found that "a direct solicitation closely links the quid—avoiding the judge's future disfavor-to the quo-the contribution" and that "the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means." *Id.* at 989-90. The court thus found that the prohibition serves the "anticorruption rationale articulated in *Buckley* and acts to preserve judicial impartiality." *Id.* at 989; *see also Stretton*, 944 F.2d at 145 ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court.").[3]

The Seventh Circuits reasoning in *Seifert* and *Bauer* is sound: there is an important distinction between the restriction on core speech that the Court held subject to strict scrutiny in *White* and Canon 7C(1)'s restriction on judicial candidates personally soliciting campaign contributions. This Court should therefore apply exacting scrutiny to determine whether Canon 7C(1) violates the First Amendment.

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[3] In upholding a federal ban on corporate political contributions, this Court rejected the argument that strict strutiny should apply to the ban, which limits contributions based on their source. *F.E.C. v. Beaumont*, 539 U.S. 146, 161 (2003). The Court relied on *Buckley*'s reasoning that restrictions on contributions "have been treated as merely 'marginal' speech restrictions" because they "lie closer to the edges than to the core of political expression." *Id.*

C. Canon 7C(1) Is Narrowly Tailored to Further the Compelling Interests of Judicial Impartiality and the Appearance of Judicial Impartiality.

As the Florida Supreme Court observed, "every state supreme court that has examined the constitutionality of comparable state judicial ethics canons has concluded that these types of provisions are constitutional, as one of a constellation of provisions designed to ensure that judges engaged in campaign activities are able to maintain their status as fair and impartial arbiters of the law." Pet. App. 13a (citing *Simes*, 247 S.W.3d at 884; *In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003); *Fadeley*, 802 P.2d at 44). This is not because state courts do not understand First Amendment requirements; rather, state courts understand the realities of judicial elections and the need for a certain amount of latitude in crafting prophylactic ethical rules.

In finding that personal solicitation bans are narrowly tailored, the state courts have focused on the fact that although a judicial candidate may not personally solicit campaign contributions, the code provisions permit campaign committees to solicit funds on behalf of judicial candidates and this provides an adequate, alternative means of obtaining funding. *See* Pet. App. 15a (holding that Canon 7C(1) was narrowly tailored because Ms. Williams-Yulee "was not completely barred from soliciting funds, but was simply required to utilize a separate campaign committee to engage in the task of fundraising"); *Simes*, 247 S.W.3d at 883 (holding that Arkansas's personal solicitation ban was narrowly tailored because it seeks to "insulate

judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns"); *Fadeley*, 802 P.2d at 41 (holding that Oregon's personal solicitation ban was narrowly tailored because "it permits the judge to obtain funds to carry out a campaign but eliminates the specter of contributions going from the hand of the contributor to the hand of the judge").

The federal courts that have invalidated personal solicitation bans like Canon 7C(1) have not suggested that campaign committees are unable to solicit sufficient funding; rather, they are concerned that personal solicitation bans are not the least restrictive alternative method of furthering the States' compelling interests. *See, e.g., Carey*, 614 F.3d at 205 (finding that Kentucky's personal solicitation ban, which prohibited judicial candidates from asking for campaign contributions from large groups and with signed mass mailings, restricted too much speech and did too little to protect Kentucky's interests in allowing "the candidate's best friend to ask for a donation directly from an attorney who frequently practices before the court"). But in responding to arguments that personal solicitation bans like Canon 7C(1) are either underinclusive or overinclusive or both, many federal judges have recognized the practical problem of precise line-drawing with regard to personal solicitation bans. *See Wersal*, 674 F.3d at 1032 (noting that the application of strict scrutiny to Minnesota's solicitation ban "illustrated the 'futility of requiring unattainable precision'") (Loken, J., concurring (quoting *Republican Party of Minn. v. White*, 416 F.3d 738, 785 (8th Cir. 2005) (en banc) (Gibson, J., dissenting)); *Bauer*, 620

F.3d at 710 (rejecting the argument that Indiana's personal solicitation ban was not as narrowly tailored as the Wisconsin ban upheld in *Siefert* because "[i]t is the nature of rules to be broader than necessary in some respects" and that "[l]aws need not contain exceptions for every possible situation"); *Stretton*, 944 F.2d at 146 (acknowledging that a judicial candidate may learn who contributed to his or her campaign but determining that the solicitation prohibition "cannot be faulted because it does not go far enough").

Ms. Williams-Yulee argues that either recusal or contribution limits are less restrictive alternatives that would further the State's compelling interests. Petitioner's Br. at 23-25. But these alternatives do not provide the panacea that she suggests.

Recusal is not a valid solution because "'judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins' and thus '[i]t would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution.'" *Wersal*, 674 F.3d at 1031 (quoting *Siefert*, 608 F.3d at 990). This is especially a problem in counties with small populations that may only have one or two superior court judges. Four counties in Arizona have only one superior court judge. http://www.azcourts.gov/2013annualreport/JudiciaryOrganizationalChart.aspx (last visited Dec. 22, 2014); *see also Wolfson v. Concannon*, 750 F.3d 1145, 1168 (Tallman, J., dissenting in part), *reh'g en banc granted*, 768 F.3d 999 (9th Cir. 2014). Recusal is also unworkable because it "serves as an after-the-fact remedy that is insufficient to cure the damage to the appearance of impartiality

fashioned by personal solicitation, which is by and large complete at the time of the 'ask.'" *Wersal*, 674 F.3d at 1031.

Although this Court has upheld limits on the amount of campaign contributions under exacting scrutiny in *Buckley*, those limits involve line-drawing that is not as narrowly tailored as personal solicitation bans, especially in jurisdictions with a limited number of judges. And limits on contribution amounts are more likely to limit the amount of a judicial candidate's core speech than a personal solicitation ban. States should be accorded sufficient latitude to determine which regulation or combination of regulations best furthers their compelling interests in judicial impartiality and the appearance of judicial impartiality.

CONCLUSION

This Court should affirm the Florida Supreme Court's decision.

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AMICUS CURIAE BRIEF

No. 13-1499

In The Supreme Court of the United States

LANELL WILLIAMS-YULEE

Petitioner,

—v—

THE FLORIDA BAR,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF CAMERON A. BLAU, ESQ. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

In this *Amicus Brief*, Cameron Blau addresses whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.

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STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae Cameron Blau is a former candidate for District Judge for the November, 2014 election, and will be a candidate for District Judge in future elections, as well as an Intervening Plaintiff in the matter of *Winter, et. al. v. Wolnitzek, et. al.*, EDKY 2:14-cv-00119-ART-CJS, which involves challenges to various aspects of Kentucky's Judicial Canon 5, which governs political activities, including a prohibition upon personal solicitation.

Amicus Curiae seeks to engage in various activities that fall within the scope of the First Amendment, but is prohibited by certain Judicial Canons, in the course and scope of his campaigns, and has an interest aligned with many other potential and future judicial candidates. His interest in this matter includes both the narrow issue that certiorari was granted on—personal solicitation—and includes a much wider interest, since the decision in this matter could have a significant impact upon judicial candidates, judges, and the general public. *Amicus Curiae* adheres to the belief that a fully informed electorate is the best remedy and prevention to bad government, and that

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

obtaining a fully informed electorate is best achieved not through more restrictions on speech and activities such as fundraising that implicate speech, but rather through more speech, and less restrictions.

This Court, in *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002), first entered the fray of speech in judicial elections, and invalidated the so called "announce clause," determining that it was not narrowly tailored to advance a compelling state interest—namely the avoidance of bias against parties. Since *White*, the American Bar Association has failed to substantially revise their model canons, and, furthermore, certain state supreme courts have promulgated a series of rules that inhibit or restrict various aspects of speech in judicial campaigns. This has included limitations on fundraising, variations of the "announce clause" invalidated in *White*, participation in political parties, restrictions on disclosure of a candidate's political party affiliation and that of her opponent, prohibitions on the time such fundraising can occur, and, as is present in this matter, prohibitions on personal solicitation.

SUMMARY OF THE ARGUMENT

Strict scrutiny applies. Thus, if a law does too little, or too much, to meet compelling state interests, it cannot stand. The canon at issue in this case, similar to canons that restrict party identification by candidates, limitations on speech of candidates,

endorsements by candidates, and other provisions, are both overbroad and under-inclusive. As with any campaign related speech restriction, the prohibition on a judge's personal solicitation of campaign donors, as is the case with other canons, causes the general public to achieve a less than accurate picture of the candidate they are voting for. Furthermore, the canon is facially unconstitutional.

ARGUMENT

I. STRICT SCRUTINY APPLIES AND THE CANON IS NOT NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST

"A state sets itself on a collision course with the First Amendment when it chooses to popularly elect its judges but restricts a candidate's campaign speech." *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014), *Rehearing, en banc, granted by Wolfson v. Concannon*, 2014 U.S. App. LEXIS 18602 (9th Cir. Sept. 26, 2014). "The conflict arises from the fundamental tension between the ideal of apolitical judicial independence and the critical nature of unfettered speech in the electoral political process." *Id.*

To begin with, the solicitation ban—like all of the political activity prohibitions found within many states' judicial canons, is subject to strict scrutiny review. *Republican Party of Minn. v. White*, 536 U.S. 765, 788, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002). Thus, the canon in question must be "(1) narrowly

tailored, to serve (2) a compelling state interest." *Id.* at 775. The canon does not prohibit any communication to the public, would-be supporters, or even litigants from the judge or judicial candidate. Rather, it prohibits only a specific kind of communication—a solicitation for a donation of money.[2] As this Court held in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), there is a content-based restriction, subject to strict scrutiny because "[p]laintiffs want to speak to [particular groups], and whether they may do so . . . depends on what they say." The same is true here: a judge can ask for help on the campaign, for instance, help with door-to-door canvassing, but cannot ask for a donation. The canon "focuses *only* on the content of the speech and the direct impact that speech has on its listeners." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000) (internal quotation marks omitted). Strict scrutiny applies.

States have a recognized compelling interest in preventing bias against parties, which includes the prevention of so-called "*quid pro quo*" bias, in appearance and fact. *Carey v. Wolnitzek*, 614 F.3d 189, 198-99 (6th Cir. 2010).

Nevertheless, the existence of a compelling interest is not the end of the analysis. The canon

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[2] The Florida ban goes further than many states, and also prohibits the judge or judicial candidate from personally soliciting attorneys for statements of support. But it does not prevent attorneys from announcing their support, and it does not prevent the judge's campaign committee from soliciting that same support. The analysis is thus largely the same as the solicitation for fundraising.

must be narrowly tailored to meet that interest. Thus, if the "law does too much, or does too little, to advance the government's objectives, it will fail." *Carey*, 614 F.3d 189, 201. This canon does both.

Here, the canon at issue prevents a judge from personally soliciting for certain narrow things: monetary donations (and statements of support from attorneys). But it does not prevent the judge's campaign committee from doing so, nor does it prevent the judge's family and close friends from doing so. It also does not restrict the judge from receiving, or even litigants who are presently appearing before the court from offering to make a donation to a judge's campaign committee. It does not restrict the judge or judicial candidate from learning who donated—and who did not. And it does not restrict the judge from saying "thank you" for those same donations. *Carey*, 614 F.3d 189, 198-99. With the advent of online campaign finance reporting in most states, it does not keep the judge, or the public, from seeing who donated what to the judge.[3] The canon permits a person—including a litigant—to approach the judge and offer a donation—but does not permit the judge to ask for it.

The canon does not prevent the potential judicial candidate from calling family, friends, and others, and asking the question: "If I run, will you donate?" but after the candidate declares his or her candidacy that same call, email, or other action cannot be made.

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[3] http://election.dos.state.fl.us/campaign-finance/contrib.asp#cand
http://www.kref.state.ky.us/krefsearch/

Importantly, it does not restrict the judge from soliciting for non-monetary support. The judge or candidate can ask litigants in cases before the court, as well as the candidate's friends, family, or the general public for their votes, can ask these same persons to assist with the campaign by engaging in the time-honored tradition of door-to-door canvassing or campaigning, can ask these same persons to make phone calls for the judge, or even to record video endorsements of the judge or her campaign.[4] In fact, the canon allows the judge or candidate to engage in every other form of campaigning, and to solicit others to help the judge, except for fundraising. Thus, the canon is under-inclusive.

There is yet another, equally problematic aspect of this matter: there is nothing that keeps political parties from raising funds to aid the judge, or political action committees from making independent expenditures in favor of bringing about the judge's election. Are we to presume that, merely because the judge cannot herself ask for a donation, we eliminate the possibility or appearance of *quid pro quo* corruption? If a political action committee were to invest millions in a judicial race at the behest of a litigant, is bias or its appearance eliminated? This Court has answered the question: "No." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

The canon in question is also overbroad—"indirect methods of solicitation [such as speeches to

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[4] The Florida Canon does not permit the solicitation of attorneys to engage in these activities, but makes no restriction as to the general public.

large groups and signed mass mailings] present little or no risk of undue pressure or the appearance of a *quid pro quo*." *Carey*, 614 F.3d at 205.[5] It also prohibits the judge or judicial candidate from asking for donations from persons who, if they were to appear before the judge, would require recusal. The judge is not permitted to solicit his or her parents, siblings, aunts, uncles, or in-laws. Yet if any of these persons appeared before the court, the judge would undoubtedly recuse herself. How does a prohibition that extends to such close family members avoid the appearance of bias, or actual bias, which likely exists in any event?

II. THE CANON RESULTS IN A FRAUD BEING PERPETUATED ON THE PUBLIC

The canon is part of a larger problem: states insist on conducting judicial elections to achieve the imprimatur of the public's consent to the judge being a judge, but they then seek to take the "politics"—including fundraising, participation in parties,

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[5] After the Sixth Circuit struck down Kentucky's Judicial Canons in *Carey*, 614 F.3d at 205, as overbroad as to personal solicitation and included emails, speeches to mass groups, and signed mass mailings, the Kentucky Supreme Court added an "in person" qualifier to the Canon, and re-promulgated it to read, in relevant part: "(2) A judge or candidate for judicial office shall not solicit campaign funds in person . . . ." Kentucky Judicial Canon 5(B)(2). The Kentucky Judicial Ethics Commission then thumbed their nose at the Sixth Circuit, and issued a determination that broadly interpreted "in person" to constitute any sort of communication from the judge directly on the subject, including by email or otherwise. http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_125.pdf (last visited November 11, 2014).

endorsements of, or by, other candidates, and a host of other activities—out of the political process. Furthermore, no sooner than a successful challenge is lodged in a piece of constitutional litigation, than the states attempt to end-run around such decisions. *See also, Winter v. Wolnitzek*, 2014 U.S. Dist. LEXIS 154287 (EDKY Oct. 29, 2014) ("Like a recurring bad dream, Kentucky's judicial canons keep getting struck down"). For instance, in *Carey*, 614 F.3d 189, the Sixth Circuit struck down certain provisions of Kentucky's Code of Judicial Conduct. Kentucky responded by re-promulgating various rules, with slight variations, suppressing speech and the political conduct they sought to avoid in the first place. *See* Kentucky Code of Judicial Conduct, Canon 5; *Winter*, 2014 U.S. Dist. LEXIS 154287. Can we not presume, on these facts, that there may be an intent to chill speech with an eye toward removing the politics from the political process?

But to what end? *Amicus Curiae* suggests that the end result is a hiding of truth from the general public—and the restriction of speech by the government that would otherwise reveal truth. If the judge wants to solicit, allow him or her, and let the public see it. The judge most certainly provides the fundraising committee a list of friends, colleagues, and would-be supporters, and the committee then goes about the duties of solicitation. Why? So the judge does not do it himself or herself. But is this not the epitome of hypocrisy, with one goal in mind—the judge gets to fundraise, but does not <u>appear</u> get his or her hands dirty in the process (and receive any public backlash from any fundraising activities himself or herself)?

We preserve the appearance of judges and judicial candidates not involving themselves with the unseemly task of fundraising, even though they are very much involved. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."). The Ministry of Truth, of course, is all for the notion that the judge herself is not engaged in fundraising—no how—no way. When the public raises questions about the solicitation of donations from high profile corporate executives, on one potential end of the political spectrum, or solicitation of trial lawyers, on the other, the judge or candidate can simply respond that she did not do the soliciting. Her "committee" did it. Orwell would certainly appreciate this "newspeak."

"[T]here is an equally compelling state interest in the free flow of information during a political campaign." *Wolfson*, 750 F.3d 1145 at 1155. "Deciding the relevance of candidate speech is the right of the voters, not the State." *White I*, 536 U.S. at 794 (Kennedy, J., concurring). "Whether and to what extent a judicial candidate chooses to engage in activities such as endorsing and making speeches on behalf of other candidates, fundraising for or taking part in other political campaigns, or asking for contributions is information that the electorate can use to decide whether he or she is qualified to hold judicial office." *Wolfson*, 750 F.3d 1145 at 1155. "Along with knowing a candidate's views on legal or political issues, voters have a right to know how political their potential judge might be." *Id.*

As this Court noted in *Citizens United v. FEC*, 558 U.S. 310, 356 (2010), "[w]hen Government seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."). Fundamentally, the solicitation ban prevents the public from learning, and attributing, fundraising activities to the judge or judicial candidate, even though that same candidate is almost certainly engaged—behind the scenes—in the fundraising.

This case has wider implications than solicitation. It is, at its core, the natural follow-on to this Court's determination in *White*, 536 U.S. 765, 788. The analysis employed, and determination of this matter, has implications on other issues now pending in constitutional challenges to various states' judicial canons throughout the country. Fundamentally, those cases come down to one key question: do we continue to pretend that politics do not exist in judicial races, or do we acknowledge that politics do exist, and sweep the issue into the light of day?

As Justice Brandeis said: "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 223 (1999) (O'Connor, J. and Breyer, J. dissenting in part and concurring in part).

States cannot pretend that the judges are not involved in fundraising—or that if we keep the

candidates from doing the asking, that solves the underlying issue. We should not pretend that political parties do not work for, endorse, and get involved in judicial races; or that candidates for office—including judicial candidates—do not (though perhaps not publicly) endorse other candidates. Importantly, we should not adhere to the illusion that a candidate for office is not "political" as long as we do not allow that candidate to identify her political party and that of her opponent; or that we need to keep races "clean" and keep facts or opinions near the edges out of the races by banning "misleading" speech by judges (but allowing Political Action Committees and everyone else to make these same statements).

These questions arise in concrete challenges being raised across this nation to political speech regulations present in various states' judicial canons.[6] They have one over-arching policy—and constitutional—question in common: do we continue the mirage of a political-free state judiciary that is popularly elected, or acknowledge the fact that when we elect judges, we make them politicians, and, as such, operate in an environment of transparency and the disinfectant of sunlight?

"Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or

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[6] *See also*, Intervening Complaint, *Winter, et.al. v. Wolnitzek, et. al.*, EDKY 2:14-cv-00119-ART-CJS; *Winter v. Wolnitzek*, 2014 U.S. Dist. LEXIS 154287 (Oct. 29, 2014).

the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." James Madison to W. T. Barry, August 4, 1822, Writings 9:103-9.

III. The Canon Does Not Further Any Due Process Interest, but Instead Frustrates It

The prevention of *quid pro quo* bias has been determined to be a compelling interest, which raises due process considerations. *Caperton*, 556 U.S. 868. The prohibition on personal solicitation of monetary contributions (but the allowance of solicitation of other non-monetary contributions and support), and the pushing of the task of fundraising to a committee does not further due process. If anything, a person seeking to engage in *quid pro quo* activities would be more likely to funnel significant funds to a political action committee, particularly one that is not subject to disclosure or other transparency requirements. The requirements "may in fact encourage the movement of money away from entities subject to disclosure." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014). This is because "[i]ndividuals can, for example, contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors." *Id.*

If the judge—or her committee does the soliciting of those donations, those donations are subject to public disclosure requirements. This, in turn, allows parties to know whether or not a request for recusal may be appropriate. *Caperton*, 556 U.S. 868. Due process, of course, requires notice and an opportunity to be heard. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). There is no notice to a party or litigant if the campaign

assistance comes from a political action committee that makes only independent expenditures. But the judge, or judicial candidate would likely know who was behind it—if only after-the-fact.

How is it that the recusal issue came about in *Caperton*, 556 U.S. 868? It was only because the company CEO's support of Justice Benjamin was widely known. How much more transparent, and how much better of a basis for recusal would have been presented, in *Caperton*, had proof been given that Justice Benjamin had solicited the same CEO of the coal company for the donations and support at issue? That did not occur, because the West Virginia Canon prevented it. But that simply demonstrates the issues with this canon—it sweeps potential bases for recusal into the darkness, instead of the light of day. In the process, it raises threats to the due process rights of litigants who may not even know it.

Thus, the canons work to make opaque potential violations of due process rights.

IV. THE CANON IS FACIALLY INVALID

In the First Amendment context this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6, (2008); *United States v. Stevens*, 559 U.S. 460 (2010).

The under-inclusiveness and over-breadth of the canon, as discussed *infra*, creates just such a case.

Stevens, 559 U.S. 460. Here, *Amicus Curiae* suggests there is no legitimate sweep to the canon at issue. That said, while the canon is certainly invalid as-applied to websites, emails, and other forms of solicitation, it is equally invalid in other contexts, because it is under-inclusive and overbroad. It should be declared invalid on its face.

CONCLUSION

Amicus Curiae requests that this Court reverse the decision of the Florida Supreme Court, and declare Canon 7C(1) of the Florida Code of Judicial Conduct facially unconstitutional under the First Amendment of the Constitution.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

13-1499

Supreme Court, U.S.
FILED
DEC 23 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

—v.—

THE FLORIDA BAR,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, JUSTICE AT STAKE, CAMPAIGN LEGAL CENTER, DEMOS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., COMMON CAUSE AND CENTER FOR MEDIA AND DEMOCRACY IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae the Brennan Center for Justice at NYU School of Law is a non-profit, nonpartisan public policy and law institute that recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system and works to protect them from the undue influence of partisan politics.[2]

Amicus curiae Justice at Stake is a non-profit, nonpartisan national partnership of more than fifty organizations that focuses exclusively on keeping courts fair and impartial through public education, litigation and reform.

Amicus curiae the Campaign Legal Center is a non-profit, nonpartisan organization that represents the public interest in administrative and legal proceedings to promote the enforcement of governmental ethics, campaign finance and election laws.

Amicus curiae Common Cause is a non-profit, nonpartisan citizens' organization with

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[1] Under Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] This brief does not purport to convey the position of NYU School of Law.

approximately 400,000 members and supporters nationwide. Common Cause has long been concerned with the growing problem of money and its undue influence in our political process, including in judicial elections. The organization has publicly advocated for appropriate campaign finance and judicial ethics rules to protect fair and impartial justice in our courts.

Amicus curiae the Center for Media and Democracy is a national, nonpartisan, non-profit watchdog group based in Madison, Wisconsin that promotes corporate and government accountability through research and public education.

Amicus curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and people living with HIV. In 2005, Lambda Legal established a Fair Courts Project to expand access to justice in the courts for LGBT and HIV-affected communities and to encourage people across the nation to take action to support judicial independence and judicial diversity. The communities Lambda Legal represents depend upon a fair and impartial judiciary to enforce their constitutional and other rights.

Amicus curiae Demos is a non-profit, nonpartisan public policy center whose mission is to ensure that we all have an equal say in our democracy and an equal chance in our economy. Demos pursues this mission through litigation,

research, advocacy and policy development. Judicial independence and integrity are indispensable to Demos' missions and goals.

Each *amicus* has an interest in this case because of its exceptional importance in protecting the reality and appearance of judicial impartiality.

SUMMARY OF ARGUMENT

Judicial integrity is a "state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). To protect this interest, it is vital that states maintain both the appearance and reality of judicial fairness and impartiality.

Judges play a unique role in our tripartite system of government. They are constitutionally obliged to apply the law to the facts when hearing cases, without favor or regard to the interests of their supporters. For this reason, judicial candidates are in a fundamentally different position than candidates for political office. Politicians are representatives of the people and must be responsive to the popular will. Judges, on the other hand, must uphold the rule of law without regard to the interests of the voters.

While fundraising is a frequent aspect of judicial elections, personal solicitation of contributions by judges and judicial candidates poses a unique — and severe — threat to judicial impartiality and its appearance. Personal solicitation "closely links the quid — avoiding the

judge's future disfavor — to the quo — the contribution." *Siefert v. Alexander*, 608 F.3d 974, 989 (7th Cir. 2010). It therefore raises the specter that judges, either consciously or unconsciously, may favor campaign contributors and disfavor non-contributors in the adjudication of their cases. Florida's Canon 7C(1), which bars personal solicitation of contributions by judicial candidates while allowing candidates to fundraise via a separate committee, is a reasonable and targeted response to this threat. Fla. Code of Jud. Conduct, Canon 7C(1).

Personal solicitation threatens judicial integrity in two key ways. First, it negatively affects the appearance and reality of judicial impartiality for lawyers and potential litigants — both those who are personally solicited and those who are not. When judicial candidates solicit campaign contributions themselves, it can create a reasonable perception that judges are seeking funds in return for favorable treatment, or, at least, that the solicitation will result in conscious or unconscious judicial bias in favor of contributors and against those who refuse to contribute. At the same time, those who are not solicited, but who know that a judge before whom they are appearing may have personally sought a contribution from their adversary, may reasonably feel that they are at a disadvantage in the courtroom.

Second, personal solicitation adversely impacts the public's perception of judicial impartiality by contributing to the appearance that judges are influenced by campaign contributions. A

recent poll in the thirty-nine states that elect judges found that 63% of respondents would have less confidence in the courts if judicial candidates could personally ask for contributions, whether by mail or email, over the phone, or face to face. Of those who responded that their confidence would be lowered, 81% said that personal solicitation by judicial candidates would lower their confidence in the courts a "great deal." Brennan Center for Justice & Justice at Stake, *Thirty-Nine State Poll* (Dec. 2014), http://www.brennancenter.org/sites/default/files/analysis/Williams-Yulee%20Poll%20Dec%202014.pdf (poll results), http://www.brennancenter.org/sites/default/files/analysis/Williams-Yulee%20Poll%20CROSSTABS.pdf (cross-tabs) ("Brennan Center & Justice at Stake 2014 Poll").

The need for Canon 7C(1) is particularly acute in light of the dramatic rise in judicial campaign fundraising in recent years and the prominent role of lawyers and lobbyists as contributors. Contributions in state supreme court races more than doubled between 2000 and 2009 as compared to the previous decade, putting new pressures on judges to fundraise and on would-be contributors to give money. James Sample, Adam Skaggs, Jonathan Blitzer & Linda Casey, *The New Politics of Judicial Elections 2000-2009: Decade of Change* 8 (Charles Hall ed., Aug. 2010) *available at* http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf ("*The New Politics of Judicial Elections 2000-2009*"). Lawyers and lobbyists have been the largest source of contributions, comprising nearly 30% of total contributions in state supreme court races from

2000 to 2012. *See Follow the Money*, Nat'l Institute on Money in State Politics ("NIMSP") (2013), http://www.followthemoney.org/show-me?y=2012,2011,2010,2009,2008,2007,2006,2005,2004,2003,2002,2001,2000&f-core=1&c-r-ot=J#[{1|gro=d-ccg ("NIMSP Lawyers & Lobbyists"). Polls suggest that 95% of the public believes campaign contributions impact judicial decisions — and that nearly half of state court judges agree. *See* Justice at Stake & Brennan Center for Justice, *National Poll* 3 (Oct. 2013), http://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf (95% of respondents in national poll believed contributions to judicial elections have at least a little influence on judicial decisions) ("2013 National Poll"); Justice at Stake, *State Judges Frequency Questionnaire* 5 (Nov. 2001–Jan. 2002), http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf (46% of surveyed state supreme, appellate, and lower court judges believed campaign contributions have at least a little influence on judicial decisions) ("Justice at Stake Frequency Questionnaire").

Florida's Canon 7C(1) is a tailored response to these concerns, targeting the most significant opportunity for inappropriate pressure on litigants and lawyers, and the greatest threat to the public's perception of judicial impartiality: the personal request for a contribution by judicial candidates themselves. Significantly, Florida's Canon 7C(1) does not prohibit fundraising — it simply requires that candidates utilize a committee to solicit contributions. Such committees, which can be

staffed by volunteers, are widely utilized in states around the country and have not created a meaningful hurdle to fundraising. Moreover, prohibiting personal solicitation in no way inhibits judicial candidates from communicating about their fitness for office or speaking on issues of public concern.

In short, Canon 7C(1) furthers a compelling state interest without encroaching on core First Amendment freedoms and, accordingly, should be upheld.

ARGUMENT

I. CANON 7C(1) PROTECTS FLORIDA'S VITAL INTEREST IN MAINTAINING THE REALITY AND APPEARANCE OF JUDICIAL IMPARTIALITY AND PRESERVING PUBLIC CONFIDENCE IN THE EVENHANDED ADMINISTRATION OF JUSTICE

Canon 7C(1) advances Florida's compelling interest in preserving the integrity of its judiciary by targeting conduct that poses a grave danger to the reality and appearance of judicial impartiality.

Prohibiting personal solicitation responds to the public perception that judges may ask for contributions in return for favorable treatment, or, at least, that personal solicitation will result in judges consciously or unconsciously favoring those who contribute and disfavoring those who decline or who are not solicited. These concerns have become heightened as the contributions pouring

into judicial elections have skyrocketed in recent years, putting public confidence in the judiciary at increasingly serious risk.

A. An Impartial Judiciary Serves a Crucial and Unique Role in Our Democratic System

The integrity of our judicial system is essential to the rule of law. Since our nation's founding, it has been fundamental to our system of government that "[j]udges are sworn 'to do equal right and justice to all men, to the best of their judgment and abilities, according to law.'" *Pollard v. Shaffer*, 1 U.S. 210, 213 (Pa. 1787) (citation omitted). To comply with their oaths, judges necessarily must administer justice impartially. The duty to administer justice without bias or favor is unique to the judicial branch and is in marked contrast to the duties of the political branches.

Judges play a different role in our democracy than politicians. Those elected to legislative and executive office are expected to be responsive to their constituents' concerns and to advocate for and to seek policy outcomes consistent with the desires of those they represent. This Court has stated that it is "a central feature of democracy — that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

In contrast, a judge must apply the law to the facts of each case and reach a just result. The failure to do so would constitute a violation of the

judge's oath to administer equal justice under the law. As Chief Justice Roberts testified at his confirmation hearing: "Judges are not politicians. They cannot promise to do certain things in exchange for votes." *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 379 (2005). Likewise, Justice Scalia has noted:

> Surely the word "representative" connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense — but not in the ordinary sense. As the captions of the pleadings in some States still display, it is the prosecutor who represents "the People"; the judge represents the Law — which often requires him to rule against the People.

Chisom v. Roemer, 501 U.S. 380, 410-11 (1991) (Scalia, J., dissenting).

This critical difference between the judicial and political branches bears "on the strength of the state's interest" in regulating judicial campaigns. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (holding that Illinois's "announce clause" regulating judicial elections violated the First Amendment). It is a difference that Petitioner eschews. When judicial campaign conduct implicates the integrity of the judicial

system, a state's interest in regulation is at its apex.

B. The Appearance of Judicial Impartiality and Public Confidence in the Evenhanded Administration of Justice Are Bedrock Principles of Due Process

Petitioner concedes that Florida has a compelling interest in the reality of an impartial judiciary. *See* Pet. Br. at 14-15. But Petitioner questions whether Florida has as compelling an interest in the *appearance* of judicial impartiality. *See id.* at 15-16; *see also* Br. for the Thomas Jefferson Ctr. for the Protection of Free Expression as *Amicus Curiae* at 3-4. There is no authority supporting such a dichotomy. On the contrary, this Court repeatedly has emphasized that the appearance of an impartial judiciary is a critical component of due process in which the state has a compelling interest.

It is well-settled that "the *appearance* as well as the actuality of fairness, impartiality and orderliness [are] the *essentials of due process.*" *In re Gault*, 387 U.S. 1, 26 (1967) (emphasis added). Indeed, for litigants, "the *appearance of evenhanded justice . . . is at the core of due process.*" *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) (emphasis added); *accord Offut v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). This is particularly so because actual bias rests on a mental state that can be difficult to prove. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009).

The appearance of an impartial judiciary is also compelling because it "'generat[es] the feeling, so important to a popular government, that justice has been done' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him," and thereby preserves public confidence in the judiciary. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted). Indeed, "[t]he legitimacy of the Judicial Branch ultimately depends on its *reputation* for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added).

As Justice Kennedy aptly put it in *White*, "[t]he citizen's respect for judgments depends in turn upon the issuing court's absolute probity. *Judicial integrity is, in consequence, a state interest of the highest order.*" 536 U.S. at 793 (Kennedy, J., concurring) (emphasis added). It follows, as the Court held in *Caperton*, that "'public confidence in the fairness and integrity of the nation's elected judges' . . . is a vital state interest." 556 U.S. at 889.[3]

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[3] This Court has also stressed the importance of the government's interest in the appearance of an impartial judiciary and in preserving public confidence in the judiciary in numerous other cases. *See Liteky v. United States*, 510 U.S. 540, 548 (1994) (in assessing recusal, "what matters is not the reality of bias or prejudice but its appearance"); *Cox v. Louisiana*, 379 U.S. 559, 565 (1965) ("A State may also properly protect the judicial process from being misjudged in

(continued...)

Petitioner raises the specter that the state's compelling interest in the appearance of judicial impartiality could support "all manner of restrictions . . . on speech by campaign committees, lawyers, law firms, contributors, solicitors, endorsers, supporters, opponents, the press and others too numerous to mention." Pet. Br. at 16 (citation omitted). But none of the parade of horribles imagined by Petitioner involves the threat to the appearance of judicial impartiality raised when judicial candidates personally solicit campaign contributions. In the event a state sought to regulate speech in any of the ways conjured by Petitioner, the regulation would have to pass muster under the same standard applicable here — whether it is appropriately tailored to advance a compelling state interest. As shown below, Florida's Canon 7C(1) satisfies that standard.

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the minds of the public."). The Court similarly has held with respect to the regulation of campaign contributions that "the Government's interest in preventing *quid pro quo* corruption *or its appearance* . . . may properly be labeled 'compelling.'" *McCutcheon*, 134 S. Ct. at 1445 (emphasis added); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2841 (2011) ("Our campaign finance precedents leave no doubt: Preventing corruption or the appearance of corruption is a compelling government interest.").

C. Canon 7C(1) Is Targeted to Protect Florida's Compelling Interest in the Reality and Appearance of an Impartial Judiciary

While fundraising is a frequent aspect of judicial elections, personal solicitation of contributions by judges and judicial candidates poses a particular threat to the reality and appearance of an impartial judiciary. This is especially true in recent years as fundraising in judicial elections has surged dramatically. Canon 7C(1) is a reasonable and targeted response to this threat.

1. Personal Solicitation Negatively Affects the Reality and Appearance of Judicial Impartiality

The personal solicitation of campaign contributions by judicial candidates, whether in person, over the phone, or by mail or email, compromises the reality and appearance of judicial impartiality in at least two ways. First, it negatively affects the perception of lawyers and potential litigants — both those who are personally solicited and those who are not — as to the fairness of the judicial system. Second, it adversely impacts the public's perception of judicial impartiality.

a. Impact on Lawyers and Potential Litigants

The personal involvement of a judge in requesting contributions may reasonably undermine the confidence of lawyers and potential litigants in the fairness of the judicial branch,

adding to the perception that contributors enjoy an advantage in court.

With respect to those who are solicited, "[a]llowing a judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court . . . inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate." *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 247 S.W.3d 876, 882 (Ark. 2007). Personal solicitation can create the reasonable perception that judicial candidates are offering favorable treatment in exchange for contributions. At the very least, a reasonable lawyer or litigant may fear that the result in her case is influenced, consciously or unconsciously, by her response to the personal solicitation. *See* David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 Cath. U. L. Rev. 361, 379-80 (2001) (relating anecdotes of lawyers who felt that their contributions to judicial campaigns affected their prospects in court). Importantly, personal solicitation raises greater concerns than other forms of fundraising because of the direct intercession of a judge or judicial candidate. Thus, "the perceived coerciveness of direct solicitations is closely related to their potential impact on impartiality" because "[a] direct solicitation closely links the quid — avoiding the judge's future disfavor — to the quo — the contribution." *Siefert*, 608 F.3d at 989.

Personal solicitation also compromises the confidence of those who are not solicited. Many groups of court users are unlikely to be personally

solicited by judicial candidates, such as out of state litigants and lawyers and the indigent. Those who are not solicited may reasonably fear that decisions in their cases are influenced by communications between the judge and their opponents that entail a request for a campaign contribution. For these litigants and lawyers, the personal involvement of the judge in campaign fundraising will magnify concerns that they are at a disadvantage.

b. Public Confidence

Even more pernicious is the negative impact that personal solicitation has on the public's confidence in the impartial administration of justice. Personal solicitation fosters the public perception that justice is for sale — that personal solicitation by a judicial candidate is an offer to favor one party over the other in exchange for a campaign contribution. The solicited individual's greater access to the judge and opportunity for ingratiation can also lead to a more general perception of bias in the courtroom. The "appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means." *Siefert*, 608 F.3d at 989-90. As the Oregon Supreme Court has explained:

> A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety

> and, to that extent, preserves the judiciary's reputation for integrity.

In re Fadeley, 802 P.2d 31, 40 (Or. 1990); *accord Bauer v. Shepard*, 620 F.3d 704, 710 (7th Cir. 2010) (finding personal solicitation creates the "potential for actual or perceived mutual back scratching").

A recent poll confirms the serious threat to public confidence posed by personal solicitation. In a poll of registered voters in the thirty-nine states that elect judges, 63% of respondents indicated that it would lower their confidence in the courts if judicial candidates could ask for contributions personally — by mail or email, over the phone, or face to face. Brennan Center & Justice at Stake 2014 Poll. Of this group, 81% said that personal solicitation would lower their confidence a "great deal." *Id.*

2. The Explosion of Campaign Fundraising in Judicial Elections Exacerbates the Threat to Judicial Integrity from Personal Solicitation

Florida's Canon 7C(1) is particularly crucial now, as campaign spending has skyrocketed in judicial elections across the country. Allowing judges to personally solicit campaign contributions magnifies the widely-held concern that fundraising adversely impacts the fair administration of justice.

As Justice O'Connor noted in 2002 in *White*, "campaigning for a judicial post today can require substantial funds." 536 U.S. at 789 (O'Connor, J., concurring). In the ensuing decade, the amount of

money raised for judicial campaigns has grown dramatically. For example, looking solely at the state supreme court level, direct campaign fundraising more than doubled from the period 1990-1999 to 2000-2009, jumping from approximately $83 million to nearly $207 million. *See The New Politics of Judicial Elections 2000-2009*, at 8. In 2011-2012 alone, supreme court candidates in twenty-three states raised more than $30.5 million to support their campaigns, including three candidates in retention elections in Florida who collectively raised more than $1.5 million. Alicia Bannon, Eric Velasco, Linda Casey & Lianna Reagan, *The New Politics of Judicial Elections 2011-12: How New Waves of Special Interest Spending Raised the Stakes for Fair Courts* 6 (Laurie Kinney & Peter Hardin eds., Oct. 2013), *available at* http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf ("*The New Politics of Judicial Elections 2011-2012*"). That is more than a three-fold increase since 1991-1992, when the total amount raised by all state supreme court candidates was just over $9.5 million. *See The New Politics of Judicial Elections 2000-2009*, at 5.

The increase in judicial campaign fundraising is particularly troubling given that campaign contributors are most frequently lawyers and law firms who appear before these judges. As the Third Circuit has observed:

> It is no secret that aside from family and close personal friends of the candidate (rarely affluent, or

> necessarily enthusiastic sources) judicial campaigns must focus their solicitations for funds on members of the bar. This leads to the unseemly situation in which judges preside over cases in which the parties are represented by counsel who have contributed in varying amounts to the judicial campaigns.

Stretton v. Disciplinary Bd. of the Supreme Court of Pa., 944 F.2d 137, 145 (3d Cir. 1991).[4]

Indeed, between 2000 and 2012, lawyers and lobbyists contributed nearly $3 million to campaigns for Florida's Circuit Court, Florida's trial level court, amounting to nearly 38% of all contributions to those campaigns. The contributions by lawyers and lobbyists constituted by far the highest percentage of campaign contributions by any group other than self-funding by candidates. The next highest coded group, "finance, insurance, and real estate," spent just over $300,000, constituting approximately 4% of

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[4] *Accord Siefert*, 608 F.3d at 990 ("It is an unfortunate reality of judicial elections that judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins."); *In re Fadeley*, 802 P.2d at 41 ("The persons most actively interested in judicial races, and the persons who are the most consistent contributors to judicial campaigns, are lawyers and potential litigants. The impression created when a lawyer or potential litigant, who may from time to time come before a particular judge, contributes to the campaign of that judge is always unfortunate.").

total contributions. *See Follow the Money*, NIMSP (2013), http://www.followthemoney.org/ show-me?s=FL&y=2012,2011,2010,2009,2008,2007,2006, 2005,2004,2003,2002,2001,2000&f-core=1&c-r-ot =D#[{1 | gro=d-ccg ("NIMSP Florida Contributors").[5] During the same period, lawyers and lobbyists contributed nearly $76 million to state supreme court campaigns nationwide, constituting nearly 30% of total contributions. Again, lawyers and lobbyists contributed a greater percentage of funds than any other group of contributors, in this case including the candidates themselves. *See* NIMSP Lawyers & Lobbyists.

Survey data demonstrates that these contributions impact the public's confidence in the judiciary. In a 2013 poll, 95% of respondents indicated that they believe contributions to judicial elections have at least a little impact on judicial decisions. 2013 National Poll, at 3. In the same survey, 70% of respondents indicated that it is a "very serious" problem when a judicial candidate receives campaign contributions from an individual, lawyer, business or interest group with a case on which the judicial candidate may have to rule, while an additional 20% thought it was a "somewhat serious" problem. *Id.* Only 1% of respondents thought it was "no problem." *Id.*

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[5] A group of contributors described as "uncoded/unitemized," contributed approximately $350,000, constituting 5% of total contributions. *See* NIMSP Florida Contributors.

Nor is this concern unreasonable. In a 2002 survey of state supreme, appellate and lower court judges, nearly half of the respondents indicated that they believe campaign contributions have at least a little influence on judicial decisions. Justice at Stake Frequency Questionnaire, at 5.

In the current climate, Florida's interest in prohibiting personal solicitation by judicial candidates is more compelling than ever.

II. CANON 7C(1) IS A REASONABLE REGULATION TAILORED TO FLORIDA'S COMPELLING INTEREST IN JUDICIAL INTEGRITY

Florida's Canon 7C(1) is a reasonable and modest regulation, tailored to address the specific and severe threat to the integrity of the judiciary that stems from the personal solicitation of campaign contributions. For this reason, while there is a strong basis to conclude that strict scrutiny is not the appropriate legal standard for this case, *see* Resp't. Br. at 11 n.1, Canon 7C(1) should be upheld even if strict scrutiny applies.

A. Florida's Canon Burdens No More Speech Than Necessary

Florida's prohibition against personal solicitation is tailored to protect the state's compelling interest in both the reality and appearance of an impartial judiciary. As discussed *supra* Point I, Canon 7C(1) targets the most troubling form of solicitation, personal solicitation by judicial candidates. It thus protects against a

significant risk of inappropriate pressure on litigants and lawyers, and any further erosion of public confidence in judicial impartiality. Canon 7C(1) is a tailored regulation because it addresses this harm while imposing only a minor restriction on the manner in which judicial candidates can raise funds, without barring fundraising or limiting candidates' ability to inform the public about their qualifications for office.

Canon 7C(1) represents only a modest restriction on judicial fundraising because candidates can still raise funds through a campaign committee, which can be staffed by volunteers. The Canon requires only that the campaign committee, rather than the candidate, make "the ask" for campaign contributions. Similar committees are widely utilized in states across the country and have been effective mechanisms for raising funds. Indeed, of the thirty-nine states that choose judges through elections, the vast majority, thirty, have rules that require judicial candidates to use campaign committees to solicit funds under at least some circumstances.[6] These committees have not

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[6] For the list of states prohibiting personal solicitation, see Cert. Pet. at 12. In addition, at least eight of the nine states that elect judges without a personal solicitation rule permit the use of campaign committees. *See* Ala. Canons of Jud. Ethics, Canon 7.B(4)(a); Cal. Code of Jud. Ethics, Canon 5B(2); Ga. Code of Jud. Conduct, Canon 7B(2) Commentary; Kan. Code of Jud. Conduct, Canon 4, Rule 4.4(B)(1); Md. Code of Jud. Conduct § 4 Rule 4.4(d)(1); Mont. Code of Jud. Conduct, Canon 4, Rule 4.4; Nev. Code of Jud. Conduct, Canon 4, Rule 4.2B(1); N.C. Code of Jud. Conduct, Canon 7B(4).

been a bar to effective fundraising. In 2012, eight of the ten states in which supreme court candidates raised more than $1 million had a prohibition against personal solicitation. *See The New Politics of Judicial Elections 2011-2012*, at 6 (Florida, Illinois, Louisiana, Michigan, Mississippi, Ohio, Washington and West Virginia).

Nor does Canon 7C(1) advantage incumbent judges. *See* Pet. Br. at 21. In 2012, in the states that prohibit at least some forms of personal solicitation, nine of the top twenty fundraisers for state supreme court seats were non-incumbent judicial candidates. *See Follow the Money*, NIMSP (2013), http://www.followthemoney.org/show-me?s=AK,AZ,AR,CO,FL,ID,IL,IN,IA,KY,LA,MI,MN,MS,MO,NE,NM,NY,ND,OH,OK,OR,PA,SD,TN,UT,WA,WV,WI,WY&y=2012&f-core=1&c-r-ot=J#[{1|gro=c-t-id. In 2008, twelve of the top twenty fundraisers were non-incumbents. *See Follow the Money*, NIMSP (2013), http://www.followthemoney.org/show-me?s=AK,AZ,AR,CO,FL,ID,IL,IN,IA,KY,LA,MI,MN,MS,MO,NE,NM,NY,ND,OH,OK,OR,PA,SD,TN,UT,WA,WV,WI,WY&y=2008&f-core=1&c-r-ot=J#[{1|gro=c-t-id.

These states' experiences demonstrate that judicial candidates — both incumbents and non-incumbents — can raise adequate campaign funds in states with rules prohibiting personal solicitation. Moreover, to the extent that Canon 7C(1) removes "the most effective means for raising money," it "only underscores the fact that solicitation in person does have an effect — one that lends itself to the appearance of coercion or

expectation of impermissible favoritism." *Stretton*, 944 F.2d at 146.

Canon 7C(1) is also narrow with respect to the kind of speech it restricts. Unlike the canon at issue in *White*, in which the Court struck down a rule prohibiting judicial candidates from stating their views on disputed legal or political issues, Canon 7C(1) does not restrict "speech about the qualifications of candidates for public office," which is "at the core of our First Amendment freedoms." 536 U.S. at 768, 774 (citation omitted). To the contrary, judicial candidates remain free to express their views on important issues, describe their values, or otherwise discuss any matter bearing on their qualifications for public office. The only restriction on candidates' speech is the fundraising "ask."

Florida has thus addressed a significant threat to public confidence in the fairness and integrity of its elected judges through a narrow rule that allows candidates to raise campaign funds, provides only minor limitations on fundraising activities and ensures that voters can be informed of candidates' qualifications for judicial office. Canon 7C(1) is accordingly well tailored to the compelling interest at stake. *See Stretton*, 944 F.2d at 146 (finding that Pennsylvania's prohibition against personal solicitations by judicial candidates is narrowly tailored to further the compelling state interest in the appearance of an impartial judiciary where judicial candidates have "alternative, less objectionable means for raising campaign funds"); *Simes*, 247 S.W.3d at 883 (emphasizing that Arkansas' prohibition against

personal solicitations by judicial candidates "seeks to insulate judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns"); *In re Fadeley*, 802 P.2d at 40 (holding that despite prohibition against personal solicitation by judicial candidates, "the candidate is not seriously impaired either in the ability to solicit and receive funds — a committee is permitted to do that — or in the ability otherwise to communicate the candidate's position on any issues the candidate is entitled to address — something the candidate himself or herself may do, as long as the message does not include a request for funds").

B. Canon 7C(1) Targets a Particularly Pernicious Aspect of Judicial Campaign Fundraising

In challenging the constitutionality of Canon 7C(1), Petitioner points to four aspects of judicial campaign conduct that Florida has declined to regulate. None provides a basis for concluding that Canon 7C(1) is insufficiently tailored.

First, the fact that Florida has not seen fit to prohibit personal solicitation by candidates for political office does not render the Canon unacceptably narrow. *See* Pet. Br. at 18. There are crucial differences between the judicial and political branches, and judicial elections therefore have additional compelling state interests at play. *See supra* Point I.A. By personally soliciting campaign funds, judicial candidates create the appearance of giving preference to their supporters

— an appearance that raises due process concerns not present with political candidates.

Indeed, a number of rules in addition to Canon 7C(1) regulate contact and speech between judges and potential court participants, without applying to political officeholders. For example, judges are subject to rules against *ex parte* communications. Fla. Code of Jud. Conduct, Canon 3B(7). Ethical codes also impose other campaign restrictions on candidates for judicial office, such as prohibitions against promising to rule in a particular way, Fla. Code of Jud. Conduct, Canon 7A(3)(e)(i), or restrictions on the form that thank you notes to contributors can take, *see* Judicial Ethics Opinion 92-02 (Fla. Jud. Ethics Advisory Comm. 1992), *available at* http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet2/92-02.html (judicial candidates may not draft thank you notes to contributors on judicial stationary).

Second, the fact that judicial candidates can learn the identities of their contributors through their campaign committees also does not render Canon 7C(1) insufficiently tailored. *See* Pet. Br. at 18-20. The risk and appearance of bias are greater when judicial candidates can personally ask for contributions than when a committee solicits funds and subsequently informs candidates of the identities of persons who have already made contributions. Personal solicitation more directly and immediately links the request for money with the expectation of future favor or disfavor in a case. *See Siefert*, 608 F.3d at 989-90.

Thus, the prohibition against personal solicitation is designed to "draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate." *Stretton*, 944 F.2d at 146. The American Bar Association's commentary to its 1973 model rule prohibiting personal solicitation reflects the special concern about the act of solicitation itself, noting that the purpose of requiring judicial candidates to use a campaign committee is "to insulate the candidate to some extent and thereby reduce the danger of the appearance of a lack of impartiality toward those persons who financially support him, or refuse to support him . . . ." E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 98 (1973).

Third, the fact that Florida allows judicial candidates to ask individuals to serve on their campaign committees and to ask non-lawyers to urge others to vote for them, *see* Pet. Br. at 20, is likewise consistent with Florida's compelling interest in barring direct solicitation. Florida's exclusion of volunteer services from its definition of a contribution, Fla. Stat. § 106.011(5)(d), corresponds with this Court's jurisprudential distinction between the regulation of campaign contributions and of volunteer activities. This Court has consistently upheld laws that limit campaign contributions to guard against corruption, but allow individuals to volunteer for campaigns as a core exercise of political speech. *See Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (per curiam) (explaining that contribution limits focus on preventing corruption "while leaving persons free to engage in independent political expression,

to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources"); *see also McCutcheon*, 134 S. Ct. at 1441.

Finally, Petitioner contends that Florida's Canon is too narrow because it allows judicial candidates to learn the identities of individuals or groups making independent expenditures in connection with their campaigns. *See* Pet. Br. at. 20-21. Like volunteer activities, independent expenditures are treated differently than campaign contributions as a matter of law. This Court held in *McCutcheon* that "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." 134 S. Ct. at 1452. The fact that Florida's rule does not cover independent expenditures is consistent with current jurisprudence. Indeed, as discussed above, knowing the identities of contributors does not create the same risk that the direct "ask" by a judicial candidate will be perceived as an offer to favor the lawyer or potential litigant who responds with a contribution.

C. Other Regulations Are Inadequate to Protect the Interest at Stake in Barring Personal Solicitation

Canon 7C(1) is also well-tailored because no other regulatory mechanism is adequate to address the interests it protects. Contrary to Petitioner's assertion, neither judicial recusal nor contribution

limits for judicial elections is a less restrictive alternative to Canon 7C(1). *See* Pet. Br. at 23-25. Indeed, while recusal and contribution limits protect due process and public confidence in the judiciary, their limitations demonstrate the importance of evaluating Canon 7C(1) as part of a set of interlocking regulations that work together to protect the integrity of the judiciary.

Recusal alone is inadequate to remedy the harm created by personal solicitation. Recusal has a narrow purpose: it is designed to remove a judge who may be or may appear to be biased in a particular case. As such, it is ill-suited to address system-wide conduct that threatens judicial impartiality, such as the personal solicitation of contributions. Recusal also has a number of practical limitations that render it insufficient to protect against the harm caused by personal solicitation.

First, because recusal motions frequently require judges to assess their own biases, recusal rules are often under-enforced. As this Court has explained, a judge may not be able to articulate, or even be conscious of, all the factors that might influence her decision-making. *See Caperton*, 556 U.S. at 883; *see also* James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, Brennan Center for Justice 20 (2008) ("*Fair Courts: Setting Recusal Standards*"). Indeed, a judge may "simply misread[] or misapprehend[] the real motives at work in deciding the case." *Caperton*, 556 U.S. at 883; *see also*, Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification*

Disputes and Should Reshape Recusal Reform, 32 St. Louis U. Pub. L. Rev. 235, 251 (2013) ("Since we tend to consistently and unconsciously downplay our own biases while exaggerating biases in others — this difference in perspective will lead to systemic errors in applying the current substantive standards for disqualification."); Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 Geo. J. Legal Ethics 441, 479 (2006) ("[J]udges may convince themselves they can rule fairly, unaware that the currents of bias often run deep."); Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. Rev. 943, 945 (2011) ("'We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.'") (citation omitted).[7]

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[7] The difficulty in self-assessment is compounded by the fact that in many states an impartial decision-maker never reviews recusal motions. *See* Sparling, 19 Geo. J. Legal Ethics at 480; *see also Fair Courts: Setting Recusal Standards*, at 20 ("The fact that judges in many jurisdictions decide on their own recusal challenges with little or no prospect of immediate review, is one of the most heavily criticized features of United States disqualification law — and for good reason."). Additionally, while judicial recusal is an important tool to protect due process, as Chief Justice Roberts emphasized in dissent in *Caperton*, recusal in the context of judicial campaign spending raises thorny issues of administration. *Caperton*, 556 U.S. at 893-98 (Roberts, C.J., dissenting). In contrast, Canon 7C(1) is a clear, bright-line rule.

Second, recusal motions are likely underused by litigants because they are generally perceived to be risky. Litigants are often reluctant to make such a motion for fear that were it not to succeed, it could offend the presiding judge while adding to litigation expenses. *See Fair Courts: Setting Recusal Standards*, at 20.

Finally, using recusal as the principal response to the threat caused by personal solicitation would hinder courts' ability to efficiently dispose of cases. As discussed *supra* Point I.C, lawyers and lobbyists are the most significant contributors to judicial campaigns. Should states rely on recusal rules as the sole remedy for the many potential sources of bias introduced through personal solicitation, judges may be required to recuse themselves in a large number of cases. Widespread recusal could lead to significant litigation delays and increased expense, particularly in small jurisdictions with few judges. Indeed, requiring elected judges to routinely decline to sit interferes with the duty they are democratically elected to perform — a far greater burden than shifting personal solicitation for campaign funds to a committee selected by the candidate.

Contribution limits likewise fall short as a less restrictive alternative to Florida's prohibition against personal solicitation. Regulation of contribution limits is indeed crucial to protecting against corruption or the appearance of corruption. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1441; *Buckley*, 424 U.S. at 26-27. However, contribution limits are not designed to accommodate the state's due

process interest in "'public confidence in the fairness and integrity of the nation's elected judges.'" *Caperton*, 556 U.S. at 889 (citation omitted). Under this Court's precedent, determining an appropriate contribution limit requires balancing a number of factors, including the rights of contributors to support the candidates of their choice, the interest in preventing corruption, and the need to secure the electoral process against incumbent self-protection. *See Randall v. Sorrell*, 548 U.S. 230, 248-49 (2006). In light of these multiple considerations in setting contribution limits, there is no reason to think that the balance achieved will be sufficient to address the specific threats to impartiality posed by judicial candidates personally soliciting contributions.

Indeed, there is no evidence that Florida's contribution limits for judicial candidates were ever intended, on their own, to be adequate to protect the state's interest in the appearance and reality of judicial impartiality, especially because they were established against a regulatory backdrop that included other safeguards such as the prohibition against personal solicitation.

D. The Application of Canon 7C(1) to Petitioner's Solicitation Is Tailored to Protect a Compelling Interest and, Regardless, Petitioner's Challenge to Canon 7C(1) Should Be Limited to Its Facts

Petitioner makes much of the fact that the personal solicitation at issue in this case was a mass mailing under Petitioner's signature. Petitioner's mailing may have been less pernicious

to public confidence in judicial impartiality than an in-person, one-on-one exchange, but a statute or regulation is not invalid simply because it prohibits gradations of conduct that all present the same harm but not necessarily to the same degree. *See Buckley*, 424 U.S. at 30 ("[D]istinctions in degree become significant only when they can be said to amount to differences in kind.").

Like all personal solicitations, mass mailings raise heightened concerns about the threat of judicial bias because they reflect the candidate's active participation in seeking contributions. *See supra* Point I.C. In addition, mailings are not less coercive per se than other forms of personal solicitation. For example, a mailing by a judicial candidate that highlights particular cases or categories of cases could cause potential contributors with an interest in those cases, to reasonably conclude they would gain an advantage in court from contributing. Indeed, one virtue of Florida's personal solicitation Canon is that it creates a bright-line rule that is unambiguous for candidates and highly administrable, while imposing only a very modest limitation on campaign activities.

Finally, even if this Court were to conclude that Petitioner's mass mailing was protected by the First Amendment, the sparse facts of this case do not provide the Court with sufficient information to consider the myriad other applications of Canon 7C(1). Before the Court is a very limited set of circumstances in which Petitioner sent a mass mailing that produced no contributions. The record provides, at most, the basis for an as-applied

challenge to the Canon. Not at issue in this case are "one-on-one exchanges over dinner," Pet. Br. at 22, or solicitations from the bench or by telephone, email, Twitter or Facebook (including from chambers).

It is for this reason that the Court should limit the application of the law to the specific facts of Petitioner's case. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 458 (2008) (rejecting a facial challenge based on proffered hypothetical scenarios in the context of a state's ballot party designation initiative and awaiting an as-applied challenge); *Sabri v. United States*, 541 U.S. 600, 609 (2004) (stating that facial challenges are "discouraged" because "they invite judgments on fact-poor records"); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (explaining that the Court "neither want[s] nor need[s] to provide relief to nonparties when a narrower remedy will fully protect litigants"). A facial challenge to Canon 7C(1) would run contrary to the principle of judicial restraint that courts avoid unnecessary adjudication of constitutional issues. *Wash. State Grange*, 552 U.S. at 450 (citing *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). Thus, regardless of its assessment of the specific facts of Petitioner's case, this Court should avoid a broad pronouncement on the constitutionality of Canon 7C(1) and consider Petitioner's challenge as-applied, as suggested by amici in support of Petitioner. *See* Br. of ACLU & ACLU of Florida as *Amici Curiae* at 12-13.

CONCLUSION

Florida has a compelling interest in promoting the appearance and reality of an impartial judiciary. Florida's Canon 7C(1) imposes a minor restriction on judicial candidates by requiring that a campaign committee, rather than the candidate herself, solicit campaign funds. In so doing, the state protects the public's confidence in the judiciary without infringing on a candidate's ability to either discuss her qualifications or raise necessary campaign funds. For these and the reasons set forth above, *amici* respectfully request that this Court uphold the constitutionality of Canon 7C(1) and affirm the judgment of the Florida Supreme Court.

Respectfully submitted,

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December 24, 2014

AMICUS CURIAE BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,
Petitioner,

v.

THE FLORIDA BAR,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* THE CARTER CENTER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a rule prohibiting judicial candidates from personally soliciting campaign funds violates the First Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Carter Center was founded in 1982 by former U.S. President Jimmy Carter and his wife, Rosalynn, to advance peace and health worldwide. A not-for-profit, nongovernmental organization, The Carter Center has helped to improve life for people in over 80 countries by resolving conflicts; advancing democracy, human rights, and economic opportunity; preventing diseases; and improving mental health care.

The Center's Democracy Program has observed nearly 100 elections in 38 countries since 1989 and played a leading role in building consensus on standards for democratic elections based on state obligations under public international law. The Center has surveyed nearly 200 sources of public international law in order to generate public tools for assessing elections against human rights commitments. This extensive comparative research supports the argument that protection of judicial impartiality can provide an appropriate rationale for reasonably restricting expression by judicial candidates.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both the Petitioner and the Respondent have consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

Neither the importance nor the challenge of securing an effective and independent judiciary is a uniquely American phenomenon. For decades, international and regional organizations have focused on codifying principles and standards of judicial conduct, designed to improve the confidence of citizens in the tribunals of their nations. These documents make clear that promoting judicial impartiality—and, importantly, the appearance of judicial impartiality—are core interests of governments.

International norms also underscore that maintaining the public's confidence in an impartial judiciary requires judges to accept certain limits on their conduct—limits greater than those ordinarily imposed on other citizens. Among these could be limits on expressive conduct when that conduct creates an appearance of partiality or otherwise undermines the integrity of the judiciary. For at least some countries that share our legal tradition, appropriate measures have included restrictions on judicial fundraising.

Although international norms are neither dispositive nor binding in the case before this Court, *amicus* believes these norms provide important context and counsel in favor of affirming the judgment of the Florida Supreme Court. To be sure, other nations have not adopted wholesale our First Amendment jurisprudence and competitive judicial elections are not widely practiced outside the United States. But international law norms strongly reflect the compelling government interest in judicial impartiality and the need for limits on judicial fundraising.

ARGUMENT

I. INTERNATIONAL AND REGIONAL INSTITUTIONS HAVE ARTICULATED NORMS AND PRINCIPLES OF JUDICIAL INDEPENDENCE

Over several decades, international and regional organizations have developed a body of principles and guidelines for securing the independence and impartiality of the judiciary. As early as 1948, the United Nations stressed the importance of an independent judiciary. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Other independent organizations also began to focus on judicial independence. What began as a series of projects by separate organizations would soon grow into a set of uniform principles.

In 1980, the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders requested the U.N. Committee on Crime Prevention and Control draft guidelines on the independence of the judiciary; that same year, a special rapporteur was appointed by the United Nations to study the independence and impartiality of judges and other legal officers. *See* Hon. Giovanni E. Longo, *The Human Right to an Independent Judiciary: International Norms and Denied Application Before a Domestic Jurisdiction*, 70 ST. JOHN'S L. REV. 111, 115 (2012).

Meanwhile, the International Association of Judicial Independence and World Peace (hereafter IAJIW), a group formed to promote and encourage principles of judicial independence, acted in conjunction with the International Bar Association to prom-

ulgate the New Delhi Code of Minimum Standards on Judicial Independence at the 19th International Bar Association Biennial Conference. Int'l Ass'n of Judicial Indep. and World Peace, *The New Delhi Code of Minimum Standards on Judicial Independence* (Oct. 22, 1982), *available at* <http://www.jiwp.org/#!new-delhi-declaration/c134r>. The New Delhi Standards included a code of conduct for judicial officers and steps necessary to secure judicial independence and impartiality. *Id.* In 1983, members of the IAJIW adopted the Universal Declaration on the Independence of Justice, also known as the Montreal Declaration—a set of principles governing both international and national judges and tribunals. Int'l Ass'n of Judicial Indep. and World Peace, *Universal Declaration on the Independence of Justice* (June 10, 1983), *available at* <http://www.jiwp.org/#!montreal-declaration/c1bue>.

The U.N. would revisit the issue of judicial independence and impartiality again when, in 1985, the United Nations General Assembly adopted the United Nations Basic Principles on the Independence of the Judiciary. *U.N. Basic Principles on the Independence of the Judiciary*, U.N. Doc. A/CONF.121/22/Rev/1 (1985).

The United Nations then supplemented the Basic Principles with concrete steps in aid of their implementation. In 1989, "guided by the desire to promote the independence and impartiality of the judiciary," the General Assembly approved procedures for effective implementation of the Basic Principles, including requiring the Secretary-General to report every five years on the progress of observance of the Basic

Principles throughout the world. *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*, U.N. Doc. E/RES/1989/60 (May 24, 1989), *endorsed at* G.A. Res. 44/162, U.N. Doc. A/RES/44/162 (December 15, 1989).

The Basic Principles have served as the framework for subsequent international agreements. For example, in 2000, the Judicial Group on Strengthening Judicial Integrity [hereafter the "Judicial Integrity Group"], initially comprised of a group of Chief Justices and Superior Court Judges from around the world, decided to begin drafting an updated set of standards of judicial conduct and accountability. The Judicial Integrity Group authored the Bangalore Principles of Judicial Conduct in 2002, with judicial independence as its first principle. U.N. Economic and Social Council (ECOSOC), *U.N. Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct*, U.N. Doc E/RES/2006/23 (July 27, 2006). In 2006, the United Nations Social and Economic Council passed a resolution encouraging member States to adopt the Bangalore Principles for their own judiciaries. *Id.*

The United Nations reaffirmed their commitment to judicial independence in 2003 with the adoption of the United Nations Convention Against Corruption, to which the United States is a party. The Convention specifically provides that, "[b]earing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity

and to prevent corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary." *United Nations Convention Against Corruption*, G.A. Res. 58/4, U.N. Doc. A/58/422 at art. 11(1) (2003), entered into force Dec. 14, 2005.

Several regional international bodies have developed similar standards. In 1997, a conference of Supreme Court Chief Justices from the Asia-Pacific region adopted a uniform set of standards for the protection of judicial independence, *see Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (amended 1997), *available at* <http://www.asianlii.org/asia/other/CCJAPRes/1995/1.html>, and in 1998 a group of judges, lawyers, and legal academics drafted a similar code later adopted by more than twenty Commonwealth Countries. *See* Latimer House Guidelines for the Commonwealth, art. 2 (1998), *available at* <http://www.arablegalportal.org/criminal-laws/Images/CodeLink/32.pdf>. The Statute of the Iberoamerican Judge, drafted in 2001 at a summit held in Santa Cruz de Tenerife, notes that impartiality is an indispensable condition if the exercise of jurisdictional function is to succeed. *See Statute of the Iberoamerican Judge*, Art. 7 (amended 2001), *available at* <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Statute-Iberoamerican-Judge.pdf>.

As new international judicial bodies have been established, they have also embraced the need for judicial independence and integrity as a key central

principle. For example, in 2004 the Project on International Courts and Tribunals, in association with other groups, drafted the Burgh House Principles on the Independence of the International Judiciary. *See* The Centre for International Courts &′ Tribunals, *The Burgh House Principles on the Independence of the International Judiciary*, *available at* http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf (*reproducing the Burgh House Principles on the Independence of the International Judiciary*).[2]

Thus, decades of codification efforts by international and regional organizations have established a set of international norms of judicial conduct.

II. INTERNATIONAL NORMS UNDERSCORE STATES' COMPELLING INTEREST IN MAINTAINING PUBLIC CONFIDENCE IN THE IMPARTIAL JUDICIARY

International norms reaffirm the compelling state interest in an impartial judiciary. The International Covenant on Civil and Political Rights—which the United States has signed and ratified[3]—entitles

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[2] Furthermore, IAJIW, the same organization that first promulgated both the New Delhi Standards and Montreal Declaration, released an updated set of standards in 2008. *See* Int'l Ass'n of Judicial Indep. & World Peace, *Mt. Scopus Approved Revised International Standards of Judicial Independence* (Mar. 19, 2008), *available at* <http://www.jiwp.org/#!mt-scopus-standards/c14de>.

[3] The United States ratified the International Covenant on Civil and Political Rights in 1992, subject to reservations. 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

criminal defendants and civil litigants "to a fair and public hearing by a competent, independent and impartial tribunal established by law." *Int'l Covenant on Civil & Political Rights*, art. 14, para. 1, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

Ensuring that their judiciaries meet these standards is the responsibility of national governments, which must prescribe "rules concerning the exercise of judicial office." *U.N. Basic Principles on the Independence of the Judiciary*, U.N. Doc. A/CONF.121/22/Rev/1 at 59 (1985). The United Nations thus requires "[a]ll States" to "adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic process." U.N. Doc. E/RES/1989/60 (May 24, 1989), *endorsed at* G.A. Res. 44/162, para. 1, U.N. Doc. A/RES/44/162 (December 15, 1989); *see also* U.N. Economic and Social Council (ECOSOC), *U.N. Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct*, U.N. Doc. E/RES/2006/23 (July 27, 2006) ("[T]he primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary of each country"). It is not unusual to see subnational implementation of human rights norms in a federal system. While the United States Constitution gives exclusive authority to enter into treaties to the federal government, the United States often ratifies human rights treaties with the understanding that states and localities are responsible for implementation in areas under their jurisdiction.

See, e.g., Restatement (Third) of Foreign Relations Law of the United States § 321(b) (1987).

International documents repeatedly identify impartiality as the core characteristic of an independent judiciary. *See* U.N. Economic and Social Council (ECOSOC), *U.N. Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct*, U.N. Doc. E/RES/2006/23 (July 27, 2006) ("Impartiality is essential to the proper discharge of the judicial office."); *U.N. Basic Principles on the Independence of the Judiciary*, U.N. Doc. A/CONF.121/22/Rev.1 (1985) ("[J]udges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."); International Criminal Court, *Code of Judicial Ethics*, ICC-BD/02-01-05 (2005) ("Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions."); The Centre for International Courts & Tribunals, *The Burgh House Principles on the Independence of the International ary, available at* <http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf> (*reproducing the Burgh House Principles on the Independence of the International Judiciary*) ("[J]udges shall decide cases impartially, on the basis of the facts...").

International norms not only require national judiciaries to be free of bias—they must also eschew the *appearance* of impartiality. Simply put, "appearance is as important as reality in the performance of judicial functions," and a "judge has the duty not only to render a fair and impartial decision, but also to

render it in such a manner as to be free from any suspicion as to its fairness and impartiality." U.N. Economic and Social Council (ECOSOC), U.N. Economic and Social Council Resolution 2006/23: *Strengthening Basic Principles of Judicial Conduct*, U.N. Doc E/RES/2006/23 at Gen. Cmt. 110 (July 27, 2006). The Bangalore Principles, therefore, are emphatic that not only propriety, but also "the appearance of propriety, are essential to the performance of all of the activities of a judge." *Id.* at sec. 4; *see id.* at sec. 4.1 ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."); *see also* International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners Guide* at 104 (2d ed., 2007) ("A judge shall not sit in a case where a reasonable apprehension of bias on his part or conflict of interest [or] incompatibility of functions may arise.") (quoting the Draft Universal Declaration on the Independence of Justice).

Accordingly, international norms strongly support the compelling interest of governments in maintaining the public's confidence in an impartial judiciary.

III. INTERNATIONAL NORMS SUPPORT RESTRICTIONS ON PERSONAL JUDICIAL FUNDRAISING AS AN APPROPRIATELY TAILORED MEANS OF ADVANCING THE STATES' INTEREST IN JUDICIAL IMPARTIALITY

International norms likewise support restrictions on judicial expression as a proper means of establishing a judiciary free of partiality—or appearance thereof. They recognize that, to promote the appearance of impartiality, judges labor under restrictions that are not necessarily borne by other citizens. "As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." U.N. Economic and Social Council (ECOSOC), *U.N, Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct*, U.N. Doc. E/RES/2006/23 at sec. 4.2 (July 27, 2006).

As international norms also recognize, the judge does not shed these special restrictions upon leaving the courthouse. Instead, the judge must "ensure that his or her conduct, *both in and out of court*, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and judiciary." *Id.* at sec. 2.2 (emphasis added). This is because "[e]verything—from a judge's associations or business interests, to remarks that he or she may consider to be nothing more than harmless banter—may diminish the judge's perceived impartiality." *Id.* at Gen. Cmt. 65.

At least some of the judicial conduct that may be affected could be expressive conduct. For example, the code of judicial ethics governing judges of the International Criminal Court directs them to "exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality." International Criminal Court, *Code of Judicial Ethics*, ICC-BD/02-01-05 at art. 9.1 (2005). Thus, "[w]hile judges are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice," the code directs them to "avoid expressing views which may undermine the standing and integrity of the Court." *Id.* at art. 9.2.

Other international bodies have promulgated similar restrictions. According to the Inter-American Commission on Human Rights, "[t]he general principle is that judges enjoy the right to freedom of expression like other citizens, but this right may be restricted if it affects the *independence and impartiality* that they must have in the cases in which they participate." Inter-Am. Comm'n H.R., *Guarantees for the independence of justice operators*, OEA/Ser. L/V/II, Doc 44, para. 173 (2013). *See also European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221 at art. 10(2), entered into force Sep. 3, 1953 (noting that freedom of expression may be restricted as necessary to maintain the impartiality of the judiciary).

Although the practice of popular judicial elections is not widespread outside the United States, other nations—including nations with which the

United States shares legal traditions—have placed restrictions on judges' fundraising communications. For example, Canada's ethical principles for judges, published by the Canadian Judicial Council in 1998, forbids judges to "solicit funds . . . or lend the prestige of judicial office to such solicitations." Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at ch. 6, principle C1(b); *see also* Ontario Judicial Council, *Principles of Judicial Office for Judges* (Toronto: Ontario Judicial Council, 2013) at ch. 3, commentary ("[J]udges should not lend the prestige of their office to fund-raising activities."); Judicial Council of British Columbia, *Code of Judicial Ethics* (Vancouver: Judicial Council of British Columbia, 1994) at rule 2.04(b) ("[J]udges should not participate in fund-raising activities.").

These measures were enacted, in part, to combat any appearance of improper coercion. As the ethical principles note, "[a] judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism." Canadian Judicial Council, *Ethical Principles for Judges* at C.4(2). Later, the principles add that "a judge should not allow the prestige of judicial office to be used in aid of fund raising for particular causes, however worthy. This principle suggests that judges (apart from requests to judicial colleagues) should not personally solicit funds or lend their names to financial campaigns.... [W]hen a judge is directly involved in fund raising there may be a temptation for lawyers or litigants who are canvassed to try to curry favour with the judge by contributing." *Id.* at C.6.

These comparative examples and the international norms that they reflect counsel that a limitation on a judge's fundraising activities is an appropriate means of advancing the compelling government interest in maintaining the public's confidence in an impartial judiciary.

CONCLUSION

The Court should affirm the decision of the Supreme Court of Florida. Because Canon 7C(1) of the Florida Code of Judicial Conduct is a narrowly tailored means of furthering a compelling government interest, the Court should hold that it does not violate the Constitution.

Respectfully submitted,

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December 23, 2014

AMICUS CURIAE BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INTEREST OF *AMICUS CURIAE*[1]

The Conference of Chief Justices ("Conference") was founded in 1949 to enable the highest judicial officers of the states to discuss matters of importance in improving the administration of justice, rules and methods of procedure, as well as the organization and operation of state courts and judicial systems. The Conference also makes recommendations on these matters. The Conference is comprised of the Chief Justices or Chief Judges of the courts of last resort in all fifty states, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam and the Virgin Islands. The Conference has been a leading national voice on important issues concerning the administration of justice in state courts.

This *amicus* brief is being filed pursuant to a policy unanimously approved by the Conference's Board of Directors. The policy authorizes the filing of a brief if critical interests of state courts are at stake, as they are in this case. In most states, standards for ethical behavior of judges and candidates for judicial office are prescribed in codes of judicial conduct ("the Codes") promulgated by the state's highest court. The Conference therefore has the highest interest in ensuring that the Codes are constitutional, clear, respected, and effective. The Conference's policy is to

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for Petitioner and Respondent consented to the filing of this *amicus* brief by letters dated December 15 and 18, 2014, respectively.

avoid taking a position on a specific state's code of judicial conduct or on the specifics of the decision of the state supreme court at issue. Rather, the Conference supports the constitutionality of the Codes in general.

The Conference has filed *amicus curiae* briefs in this Court in prior cases where the constitutionality of the Codes was implicated, and this Court has relied on those briefs. *See, e.g.*, *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009); *id.* at 901 (Roberts, C.J., dissenting); *Republican Party of Minn.* v. *White*, 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting). Pursuant to the Conference's policy, this brief has been reviewed and approved by a special committee of the Conference chaired by the Chief Justice of North Dakota and composed of the Chief Justices of Arizona, New Hampshire, Pennsylvania, and South Carolina, and the former Chief Justice of Utah (a past president of the Conference and a current member of the Utah Supreme Court).

INTRODUCTION

The authority of the judiciary rests on its credibility and the respect accorded to its rulings. "The citizen's respect for the judgments depends ... upon the issuing court's absolute probity." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). Judicial elections, and the associated judicial campaigns and electoral fund-raising, often create a tension between "the ideal character of the judicial office and the real world of electoral politics." *Chisom* v. *Roemer*, 501 U.S. 380, 400 (1991). To mitigate this tension, the highest courts of most states have adopted codes of judicial conduct regulating electoral activities of incumbent judges as well as candidates for judicial office. The Codes serve as "'[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'" *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (citation omitted).

Among other rules of conduct for the judicial profession, many Codes impose a restriction on direct personal campaign solicitation by a judge or a judicial candidate. Instead, both incumbent and non-incumbent candidates must conduct fund-raising through campaign committees. These committees serve as a buffer between the judge or judicial candidate and the potential donor, who is often either a lawyer or a litigant appearing in front of the judge. In doing so, the restrictions on direct judicial solicitation safeguard the critical state interests in a judiciary that is impartial in both fact and appearance, and protect lawyers and litigants from

potential coercion. Canon 7C(1) of the Florida Code of Judicial Conduct is such a restriction, mandating that judicial candidates, including incumbent judges, "shall not personally solicit campaign funds," but may conduct solicitation through campaign committees.

The restrictions on direct personal judicial campaign solicitation impede no more speech than is necessary to vindicate the compelling state interest in the judiciary's integrity. By prohibiting a direct monetary transaction between a judicial candidate and a contributor likely to appear in front of that judge, the restrictions guard against the appearance of impropriety and partiality. At the same time, these restrictions enable judicial candidates to solicit contributions needed to fund their campaigns, so long as the solicitation is channeled through an easily established campaign committee. The solicitation restrictions also protect a citizen from the potential coercion present in any contribution request by a judge or judicial candidate. They ensure that the citizen does not feel compelled to "speak" in favor of that judge through a nominally voluntary contribution. This Court should affirm the ability of states' highest courts to fashion appropriate rules for the judicial profession, designed to safeguard judicial impartiality while adhering to constitutional free speech requirements.

SUMMARY OF ARGUMENT

State codes of judicial conduct have long served as the primary means by which states protect the integrity of their judiciaries and preserve the appearance of judicial impartiality. In enacting the Codes, states have emphasized the importance of

avoiding both actual impropriety and the appearance of impropriety, and the majority of the Codes forbid direct campaign solicitations by judges or judicial candidates. A judge whose appearance of impartiality is compromised undermines the public's confidence in the judiciary as a whole, and imperils public respect for its judgments. The preservation of judicial integrity and the appearance of judicial impartiality are compelling state interests.

The Codes' restriction on direct personal solicitation is instrumental in protecting both the actual impartiality of the judiciary and the appearance of impartiality. By channeling solicitation through a campaign committee, the restriction on direct solicitation removes the specter of a litigant with a pending case or an attorney frequently appearing before the judge of bowing to an unmediated request for money by the judge. This is the form of solicitation where the appearance of corruption or bias is particularly acute, even if the judge remains actually impartial. The restriction prohibits judges or judicial candidates from directly soliciting campaign funds but allows a campaign committee to do so; thus, it extends only so far as necessary to remedy the potential ills posed by direct solicitation.

The restriction also eliminates the intimation of coercion that a lawyer or a litigant reasonably senses from a direct solicitation made by a sitting or prospective judge. By preventing coercive requests, the solicitation rule protects citizens from potentially involuntary contributions, while leaving open ample fund-raising options. As a measure designed to ensure the voluntariness of electoral campaign

contributions, the Codes' restriction on direct solicitation by judges promotes First Amendment interests.

Judicial recusal is not an effective or more narrowly tailored alternative. Recusal cannot address the threat that the act of direct solicitation poses to the appearance of judicial impartiality. Recusal is also inconsistent with a judge's ethical and professional duty to minimize the conflicts that could require recusal, and an increased use of recusals would risk creating a systemic problem of judge-shopping by litigants or lawyers.

States, being responsible for designing a judicial system that meets the needs of their citizenry, should be permitted to fashion their judicial campaign solicitation restrictions in a way that most effectively combats the threats posed by direct solicitation. States should be afforded latitude in making their policy determinations of how best to address those potential harms while adhering to the First Amendment's free speech guarantees.

Finally, this Court should not entertain Petitioner's overbreadth challenge to Florida's solicitation canon. The overbreadth doctrine is not designed for instances where, as here, Petitioner contends that the law is unconstitutional as applied to her. Moreover, it is unclear whether Petitioner has even preserved an overbreadth or other type of facial challenge, and Petitioner fails to demonstrate that the solicitation canon's numerous other applications — which would pose an even greater threat to judicial impartiality and the appearance of impartiality — would fail the narrow tailoring analysis.

ARGUMENT

A. *State Codes of Judicial Conduct Are Vital Safeguards of Public Confidence in the State Judiciary's Integrity and Impartiality.*

As this Court has acknowledged, the necessity of campaigns and campaign fund-raising results in "[a] fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom*, 501 U.S. at 400. Accordingly, all thirty-eight states with elected judiciaries impose safeguards — most of which rarely, if ever, would apply to elected officials other than judges — to help maintain the judiciary's unique role in the democratic process. In many states judges are the only elective officials, aside from attorneys general or prosecutors, who must meet special training or experience requirements, are subject to mandatory age retirement requirements, or must resign before running for a non-judicial elective office. These "[e]xplicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The legislative bodies, judicial committees, and professional associations that promulgate those standards perform a vital public service." *White*, 536 U.S. at 794 (Kennedy, J., concurring).

The Codes "are '[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'" *Caperton*, 556 U.S. at 889 (quoting Brief for the Conference as *Amicus Curiae* at 4, 11). As this Court emphasized, "[t]hese codes of

conduct serve to maintain the integrity of the judiciary and the rule of law," and are a critical component of "the judicial reforms ... implemented to eliminate even the *appearance* of partiality." *Caperton*, 556 U.S. at 888-89 (emphasis added).

The Codes' origins date to 1924, when the American Bar Association ("ABA") adopted the *Canons of Judicial Ethics*. *See White*, 536 U.S. at 786. According to Chief Justice William Howard Taft, who chaired the ABA Committee on Judicial Ethics, these canons were intended to be "the statement of standards, announced as a guide and reminder to the judiciary." *Final Report and Proposed Canons of Judicial Ethics*, 9 A.B.A.J. 449, 449 (1923), *quoted in* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1065 n.26 (1996). With respect to judicial campaigns, the *Canons* admonished that "[a] candidate for judicial position ... should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination." *See Canons of Judicial Ethics* (1924), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.authcheckdam.pdf (Canon 30). The *Canons* also imposed specific restrictions on solicitation by judges. *See, e.g., id.* (Canon 28) (a judge "should avoid ... soliciting payment of assessments or contributions to party funds"); *id.* (Canon 25) (a judge "should not solicit for charities," in order to "avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to ... contribute"). In the subsequent years, state courts

and legislatures adopted the *Canons* as substantive rules. Shepard, *supra*, at 1065.

In 1972, the *Canons* were replaced by the ABA's *Model Code of Judicial Conduct* (hereinafter, "*Model Code*"), which was developed in order to provide a more detailed set of substantive rules concerning judicial ethics. With some variations, nearly every state adopted the new *Model Code*. Shepard, *supra*, at 1066. Subsequently revised on several occasions (most recently in 2010), the *Model Code* continues to serve as the basis for the Codes adopted by states to safeguard their judiciary's impartiality and integrity.

One of the central concerns of the Codes is "avoid[ing] impropriety *and the appearance* of impropriety." *See, e.g.*, Ariz. Code of Jud. Conduct, Canon 1 (emphasis added); N.H. Code of Jud. Conduct, Canon 1 (same); N.D. Code of Jud. Conduct, Canon 1 (same); *see also Model Code*, Canon 1 (2011) (same). As the *Model Code* explains, "[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety." *Model Code*, Rule 1.2 cmt 1. Accordingly, Rule 1.2 of the *Model Code* requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and [to] avoid impropriety and the appearance of impropriety." *Id.* Rule 1.2.

The concern about safeguarding both impartiality and the appearance of impartiality also animated Rule 4.1(A)(8) of the *Model Code* — the analogue of Canon 7C(1) of the Florida Code of Judicial Conduct at issue in this case — which provides that "a judge or a judicial candidate shall not ... personally solicit

or accept campaign contributions other than through a campaign committee." *See, e.g.*, ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, *Summary of Meeting Minutes* at 3 (Oct. 21-23, 2004) (observing that the absence of a provision restricting personal solicitation by judges would create a "public perception ... problem").

Preserving judicial integrity and the appearance of judicial impartiality are compelling state interests. This Court recognized the compelling nature of these interests in *Republican Party* v. *White*, when it considered whether the announce clause of the Minnesota Code of Judicial Conduct was "narrowly tailored to serve impartiality (or the appearance of impartiality)" — two state interests asserted in support of the announce clause. 536 U.S. at 775-77. Indeed, "[e]very court to consider the issue has affirmed that states have a compelling interest in the appearance and actuality of an impartial judiciary." *Wolfson* v. *Concannon*, 750 F.3d 1145, 1156, *reh'g en banc granted*, 768 F.3d 999 (9th Cir. 2014).[2]

The appearance of impartiality is imbedded in the concept of due process, for "due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972). "Due process requires both fairness and the appearance of fairness in the tribunal." *Siefert* v.

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[2] In her briefs before the Florida Supreme Court, Petitioner has likewise acknowledged that "maintaining the public's confidence in an impartial judiciary" is a compelling state interest. *See* Initial Br. of Resp't, *Fla. Bar* v. *Williams-Yulee*, No. SC11-265, 2012 WL 5275028 at *9, *14 (Fla. Sept. 10, 2012); *see also* Reply Br. of Resp't, *Fla. Bar* v. *Williams-Yulee*, No. SC11-265, 2012 WL 8944669 at *3-*4 (Fla. Oct. 29, 2012).

Alexander, 608 F.3d 974, 985 (7th Cir. 2010). As this Court has observed, "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)). Thus, states have a compelling interest in ensuring — and, indeed, are required by the Fourteenth Amendment to ensure — that their judiciary is free from both actual and probable bias, and that it is impartial in appearance as well as in fact. *See Caperton*, 556 U.S. at 877; *see also id.* at 890 (Roberts, C.J., dissenting) (agreeing with "the need to maintain a fair, independent, and impartial judiciary — and one that appears to be such").

In the Conference's view, it is vital that the elected state judiciary is not only impartial in fact, but is also perceived as impartial and unbiased. "[M]aintaining the appearance of impartiality is systemic in nature, as it is essential to protect the judiciary's reputation for fairness in the eyes of all citizens ... . [P]ublic confidence in the judiciary is integral to preserving our justice system." *Wersal* v. *Sexton*, 674 F.3d 1010, 1022 (8th Cir. 2012) (*en banc*); *see also Bauer* v. *Shepard*, 620 F.3d 704, 711 (7th Cir. 2010) ("judges ... must be seen as impartial if judicial decisions are to be accepted by the public"). As Justice Kennedy has observed,

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends

> in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

White, 536 U.S. at 793 (Kennedy, J., concurring); *see also* The Federalist No. 78 (Alexander Hamilton) (the judiciary "may be said to have neither FORCE nor WILL, but merely judgment"). "Articulated standards of judicial conduct may advance this interest." *White*, 536 U.S. at 793 (Kennedy, J., concurring) (citation omitted).

The preservation of judicial integrity, or the appearance of judicial impartiality, is not an amorphous concept. Rather, the Conference respectfully submits, the appearance of impartiality is a standard well ascertainable and familiar to members of the states' judiciaries. "[T]he appearance of impartiality may be defined as the perception the public maintains regarding the judiciary's lack of bias for or against either party to a proceeding." *Wersal*, 674 F.3d at 1021-22. Nor are judges unable to determine whether a particular type of conduct could endanger this important interest. As the ABA *Model Code* stated,

> "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Model Code, Rule 1.2 cmt. 5.

Indeed, judges are routinely called upon to make determinations about appearances of impartiality or impropriety. As one commentator has noted, "the term 'appearance' is already the familiar standard in the codes of judicial conduct around the country." Jed Handelsman Shugerman, *In Defense of Appearances: What* Caperton v. Massey *Should Have Said*, 59 DePaul L. Rev. 529, 542 (2010); *see also id.* at 542 n.61 (collecting examples). Similarly, a federal judge or justice is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *see also Cheney* v. *United States Dist. Ct.*, 541 U.S. 913, 914, 920 (2004) (Scalia, J.) (mem.); *Code of Conduct for United States Judges*, Canon 2 ("A judge should avoid impropriety and the appearance of impropriety in all activities."); *Taylor* v. *Hayes*, 418 U.S. 488, 501 (1974) (the disqualification inquiry "must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance'") (quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 588 (1964)). There is no reason this Court (or other state and federal courts) would be unable to determine whether a particular type of conduct covered by the Codes — such as the restriction on direct solicitation — would present a danger of undermining the appearance of judicial impartiality.

B. *The Restriction on Direct Solicitation Is Narrowly Tailored To Protect Judicial Impartiality and the Appearance of Impartiality.*

The restriction on direct personal solicitation in the Codes is instrumental to protecting both the

actual impartiality of the judiciary and the *appearance* of impartiality. The restriction is designed to eliminate the specter of current or potential litigants handing over money directly to judges or prospective judges, and the risk that such an exchange poses to public perception of judicial integrity even if the judge remains, in fact, impartial. A state could reasonably conclude that an unmediated financial transaction between a judge and a litigant or attorney appearing before or likely to appear before the judge would seriously undermine the public's respect for the judiciary and its judgments. *See White*, 536 U.S. at 793 (Kennedy, J., concurring); *see also id.* at 790 (O'Connor, J., concurring) ("the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary"). "[T]he public should be protected from fearing that the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions." *Simes* v. *Ark. Judicial Discipline and Disability Comm'n*, 247 S.W.3d 876, 882 (Ark. 2007).

By prohibiting direct personal solicitations by judges and judicial candidates alike, the restriction also insulates judges from the pressure to make direct solicitation requests; if judicial candidates could make such requests, sitting judges might be forced to do the same or campaign at a disadvantage. On the other hand, a sitting judge would likely expect his direct request for a campaign contribution to be met; the absence of a restriction on direct solicitation also favors incumbency. At the same time, the

personal solicitation clause restricts speech only insofar as necessary. Both sitting judges and non-incumbent candidates for judicial office remain free to conduct fund-raising through a campaign committee. When a contribution is solicited by a campaign committee, the danger that the contribution will be wrongly perceived as a personal favor is diminished.

The personal solicitation restriction is narrowly tailored to the compelling state interest of protecting judicial impartiality and the appearance of impartiality. The restriction is designed to prohibit only the form of solicitation where the appearance of corruption (as well as potential coercion) is most likely: personal solicitation by judges and judicial candidates. *See Siefert*, 608 F.3d at 989-90 ("[T]he appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means."). In these circumstances, it is the act of asking for funds directly — not just the act of presiding over a case involving solicited parties — that threatens the appearance of judicial impartiality. Therefore, there is no other, less restrictive way to address this harm, except to restrict the judge's ability to personally make the solicitation request.[3]

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[3] These considerations may apply to mass mailings as well as to direct in-person solicitation. Here, the record does not indicate whether any recipients of Petitioner's fund-raising letter had a case pending in the court where she was seeking to serve as a judge, or whether any recipients were potential litigants or counsel who regularly appear before that court, such as sheriffs, prosecutors, or public defenders.

The restrictions do not prohibit judges from soliciting campaign funds altogether; they simply channel such solicitation through a campaign committee. The drafters of the ABA *Model Code of Judicial Conduct* recognized the danger of direct solicitation and the need for a buffer between the candidate and the party, potential party, or attorney. *See supra* at 9-10. The campaign committee acts as that buffer, eliminating the specter of a direct financial transaction between judge and party or potential party. Use of campaign committees also insulates litigants from personal requests by sitting or prospective judges, reducing the possible coercive effect. *See infra* at 23-24.

By permitting fund-raising through committees, the personal solicitation restriction extends only so far as necessary to remedy the potential ills posed by direct solicitation. It restricts less conduct, for instance, than the *Code of Conduct for United States Judges*. Canon 4(C) of that Code dictates that, except for solicitation of family members and other judges, a federal judge "should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of the judicial office for that purpose." It also requires that a judge "not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism." And a federal judge may not even participate in *planning* fund-raising, except for certain non-profit organizations. Solicitation restrictions are thus a common regulatory feature designed to uphold the integrity and impartiality of governmental decision-making. *See, e.g., id.* Canon

5(A)(3) (prohibiting political fund-raising); 18 U.S.C. § 602 (restricting solicitation by members of Congress from federal employees); *id.* § 607 (restricting solicitations in federal buildings); 52 U.S.C. § 30119 (restricting solicitations of federal contractors); 52 U.S.C. § 30125 (restricting solicitations by federal candidates for organizations).

The solicitation clause "is not just one provision ..., but is part of an integrated system, designed to ensure a fair and impartial judiciary." *Simes*, 247 S.W.3d at 883. Thus, the direct solicitation canon is not underinclusive on the asserted ground that it would not prohibit, for instance, a judicial candidate's "best friend" from soliciting an attorney who frequently practices before the court, and reporting to the candidate the result of the inquiry. *See* Pet. Br. 19-20. This type of conduct would be covered by prohibitions elsewhere in the Code. *See, e.g.*, Fla. Code of Jud. Conduct, Canon 7A(3)(d) ("except [as otherwise] permitted ..., [a candidate] shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing"); *Id.* Canon 7A(3)(b) ("[a] candidate for a judicial office ... shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity, and independence of the judiciary").

No rule or set of rules can completely insulate a judge from potential bias or preserve the appearance of impartiality. All codes of judicial conduct reflect a balance between judicial impartiality and independence on one hand and First Amendment interests on the other. A rule that bars a judge from accepting a contribution in a courtroom, for example,

may not bar the judge from stepping outside onto the sidewalk to accept the contribution and therefore could be considered underinclusive. But the fact that a state has struck a particular balance between concerns about judicial integrity and First Amendment interests should not provide a basis for condemning a rule reflecting that balancing — or other appropriate prophylactic measures that are not complete cures for the harms they seek to prevent.

C. *The Direct Solicitation Restriction Prevents Coercion, and Thereby Promotes First Amendment Interests.*

In addition to protecting impartiality and the appearance of impartiality, the solicitation rule is essential to preventing coercion. States have a compelling interest in protecting their citizens from being forced to make political contributions to judges and judicial candidates. By preventing such coercive donations, the solicitation restriction, on balance, promotes First Amendment interests.

1. Direct Solicitations by Judges Present Inherent Dangers of Coercion.

A personal solicitation by a person in a position of authority presents the potential donor with a classic Hobson's choice: contribute money or risk disappointing a person with power over his future. As this Court explained,

> [i]f contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a

> demand, and that a failure to meet the demand may be treated by those having [authority] as a breach of some supposed duty, growing out of the political relations of the parties.

Ex parte Curtis, 106 U.S. 371, 374 (1882); *see also United States* v. *Wurzbach*, 280 U.S. 396, 398-99 (1930) ("Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment"); *Lodge No. 5 of Fraternal Order of Police ex rel. McNesby* v. *City of Philadelphia*, 763 F.3d 358, 375 (3d Cir. 2014) ("paycheck deduction mechanisms ... may create pressure ... to donate ... because when contributions are 'solicited by others in official authority ... what begins as a request may end as a demand'") (quoting *Ex parte Curtis*, 106 U.S. at 374).

The concern that a solicitation will coerce a contribution — even unintentionally — is particularly acute when a judge is making the solicitation. Judges hold enormous power over the litigants or lawyers who appear before them. And situations in which a judge's solicitation of a contribution may cause coercion are easy to envision, such as where a judge solicits contributions from an attorney in a pending case during a break in trial or from a litigant or attorney who regularly appears before the court. *See also Stretton* v. *Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991) (personal solicitation by a judicial candidate is where "the coercive effect, or its appearance, is at its most intense"); *Simes*, 247 S.W.3d at 882 ("Allowing a

judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court, ... inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate."). As then-Chief Justice of Texas Wallace B. Jefferson observed, when a sitting judge calls a lawyer asking for a campaign contribution, the lawyer has no "[r]ealistic[] choice" but to donate. Wallace Jefferson, *Reform from Within: Positive Solutions for Elected Judiciaries*, 33 Seattle U. L. Rev. 625, 625-26 (2010).

Similarly, Rule 3.1(D) of the ABA's *Model Code* provides that a judge shall not "engage in conduct that would appear to a reasonable person to be coercive," and Comment 4 to that rule notes that "depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization ... might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge." *See also Model Code*, Rule 3.7(A)(2) (permitting a judge to solicit contributions for organizations or governmental entities concerned with the law and certain nonprofit organizations, "but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority"). The concern animating these restrictions is that personal solicitations by judges present an inherent possibility of coercion.

2. Restrictions on Direct Personal Judicial Solicitation Promote First Amendment Interests.

Because direct personal solicitations by judges are inherently coercive, prohibitions on such solicitations are designed to protect citizens from being forced to make political contributions. At the same time, such prohibitions impose only a minor burden on First Amendment interests.

The coercive nature of direct judicial solicitations implicates a compelling state interest in protecting citizens from extraction of coerced payments by government officials. As this Court observed in *Ex parte Curtis*, in upholding a law prohibiting executive officers or employees of the United States (with certain exceptions) from "requesting, giving to, or receiving from" another government official or employee any political donation, even "[i]f there were no other reasons for legislation of this character than such as relate to the protection of those in the public service against unjust exactions, its constitutionality would ... be clear." 106 U.S. at 374. Similarly, in rejecting a constitutional challenge to the Federal Corrupt Practices Act, this Court in *Wurzbach* explained that "[i]t hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment." 280 U.S. at 398-99. Indeed, as the Third Circuit has observed, the contention that personal solicitation by a judicial candidate "is the most effective means for raising money only underscores the fact that solicitation in person does

have an effect — one that lends itself to the appearance of coercion or expectation of impermissible favoritism." *Stretton*, 944 F.2d at 146.

This Court's decisions addressing compelled funding of private speech provide a useful analogy. The Court has observed that "'compelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2639 (2014) (quoting *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012)). This Court has also explained that

> [t]he fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Chicago Teachers Union, Local No. 1 v. *Hudson*, 475 U.S. 292, 302 n.9 (1986) (internal quotation marks and citations omitted); *see also Knox*, 132 S. Ct. at 2291 ("any procedure for exacting fees from unwilling contributors must be carefully tailored to minimize the infringement of free speech rights") (internal quotation marks omitted); *Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990) (limiting the ability of a state bar association to use mandatory dues to advance political causes at odds with a member's beliefs).

Accordingly, measures designed to ensure that political contributions are made voluntarily promote First Amendment interests. Indeed, in upholding the Hatch Act, this Court has pointed out that the act "aimed to protect employees' rights, notably their right to free expression, rather than to restrict those rights." *United States* v. *Nat'l Treasury Emps. Union*, 513 U.S. 454, 471 (1995). Similarly here, given the high likelihood of potential coercion, restrictions on direct personal solicitation of campaign contributions by judges or judicial candidates ensure that contributions to judicial candidates are "shaped by [the donor's] mind and his conscience." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997) (internal quotation marks and citation omitted).

Restrictions on direct solicitation by judges and judicial candidates impose only a minor burden on First Amendment interests. Solicitations are not pure political advocacy. By definition, a solicitation requests a financial transaction. As Justice Kennedy observed, "[t]he making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates' or officeholders' solicitation of contributions are, therefore, regulations governing their receipt of *quids*." *McConnell* v. *Fed. Election Comm'n*, 540 U.S. 93, 308 (2003) (Kennedy, J., concurring in judgment in part and dissenting in part). If solicitations were indistinguishable from pure speech, the laws of most states that require charitable organizations to register before soliciting

contributions from the state's residents would be unconstitutional.[4]

Significantly, restrictions on direct personal solicitation do not prevent a judicial candidate from addressing issues of public concern, the candidate's qualifications for office, or any other issue the candidate believes is relevant to voters. Nor do they prevent candidates from funding that speech through campaign contributions, because candidates' campaign committees remain free to solicit contributions for judicial campaigns. *E.g.*, Fla. Code of Jud. Conduct, Canon 7C(1); *see also In re Fadeley*, 802 P.2d 31, 41 (Or. 1991). In this respect, restrictions on direct personal solicitation are less burdensome on speech than even contribution limits, which are evaluated under "closely drawn" scrutiny. *See Buckley* v. *Valeo*, 424 U.S. 1, 18, 20-21, 25 (1976).

The importance of guarding against coerced contributions is reflected in laws that prohibit solicitations in circumstances where the use of government authority can cause coercion and undermine the contribution's voluntariness. At the federal level, such laws include prohibitions on campaign-funding solicitations from members of Congress to federal employees, 18 U.S.C. § 602; solicitations in federal buildings, *id.* § 607; solicitations of federal contractors, 52 U.S.C.

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[4] *See* Internal Revenue Service, Charitable Solicitation — Initial State Registration, http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Charitable-Solicitation-Initial-State-Registration ("Approximately 40 states have enacted charitable solicitation statutes. Although specifics vary, state statutes usually require organizations to register with the state before they solicit the state's residents for contributions.").

§ 30119(a)(2); and the requirement that a person soliciting a federal employee for a contribution to a separate segregated fund inform the employee of his right to refuse to contribute without reprisal, *id.* § 30118(b)(3)(C). *See also Wurzbach*, 280 U.S. at 398-99.

States have enacted similar restrictions on soliciting in governmental buildings, soliciting subordinate employees and contractors, and soliciting using governmental authority or resources. *See* National Conference of State Legislatures, Staff and Political Activity — Statutes (updated Dec. 2011), http://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx. Indeed, states have gone beyond restrictions that mirror federal law. For example, as of December 2011, twenty-nine states placed restrictions on campaign contributions during the legislative session. *See* National Conference of State Legislatures, Limits on Campaign Contributions During the Legislative Session (updated Dec. 6, 2011), http://www.ncsl.org/research/elections-and-campaigns/limits-on-contributions-during-session.aspx. These laws reflect a widespread consensus among states that solicitation restrictions are necessary to prevent governmental authority from being used to coerce contributions. As independent sovereigns, states have a strong interest in ensuring that state authority is not used to pressure citizens to act contrary to their beliefs. That interest should not be lightly weighed and measures promoting that interest should not be invalidated solely because they may not be completely effective.

D. *Judicial Recusal Is Not a Workable More Narrowly Tailored Alternative.*

The Codes' restrictions on direct personal solicitation of judicial campaign contributions are an appropriate response to safeguard the compelling state interests of preserving judicial impartiality and the appearance of impartiality. These solicitation restrictions are appropriately focused on the behavior that poses the greatest risk — direct solicitation by a judge or a judicial candidate. Notably, Petitioner does not suggest what kind of judicial campaign solicitation regulation would be a less restrictive way to preserve judicial impartiality and its appearance or to guard against coercion. "Having no rules is, of course, less restrictive. But it isn't an alternative means of furthering the interest at stake here." *Wolfson*, 750 F.3d at 1168 (Tallman, J., dissenting).

Nor can judicial recusal serve as a workable less restrictive alternative. As an initial matter, "judicial-recusal rules are self-enforced and therefore may not provide adequate safeguards against the risks that flow from treating judicial elections like legislative ones." *Carey* v. *Wolnitzek*, 614 F.3d 189, 194 (6th Cir. 2010). The fact that a judge soliciting a donation could recuse himself also does not prevent the solicitation from being coercive.

In addition, "[i]t is an unfortunate reality of judicial elections that judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins. It would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution." *Siefert*, 608 F.3d at 990; *cf. Wolfson*, 750 F.3d at 1168

(Tallman, J., dissenting) ("Constant recusal is no solution."). In courts with small bars and repeat litigants — which can be found throughout the country — recusal of a judge could work significant harm to a court's ability to function. The soliciting judge may "be disqualified so often that he will have the equivalent of a paid vacation, while other judges must work extra to protect litigants' entitlement to expeditious decisions." *Bauer*, 620 F.3d at 713.

Moreover, recusal is inconsistent with a judge's "responsibility to decide," which requires judges to minimize the conflicts that could necessitate recusal. *See, e.g.*, Ariz. Code of Jud. Conduct, Rule 2.7; N.D. Code of Jud. Conduct, Rule 2.7; Pa. Code of Jud. Conduct, Rule 2.7. Frequent recusal would conflict with this ethical and professional obligation.

Even if recusal could solve the problem of actual bias,

> recusal serves as an after-the-fact remedy that is insufficient to cure the damage to the appearance of impartiality fashioned by personal solicitations, which is by and large complete at the time of the "ask." At the very least, by the time the Due Process Clause requires recusal of a judge, the appearance of impartiality has already been impaired.

Wersal, 674 F.3d at 1031.

Indeed, an increased use of recusal would risk creating a systemic problem of judge-shopping by litigants or lawyers. In the absence of a campaign committee acting as a buffer between the judge (or

the judicial candidate) and the campaign donor, thereby helping to preserve the appearance of judicial impartiality, lawyers or litigants could selectively contribute to judicial campaigns and then force the recusal of the judge in question.

E. *States Should Be Permitted To Strike the Appropriate Balance in Regulating Judicial Elections.*

The fact that some states fashion their judicial campaign solicitation restrictions in a different way from Florida (at times as a result of lower courts' prior rulings on the question before this Court), and some do not impose restrictions on direct personal solicitation, *see* Pet. Br. 27, is reflective of our Nation's federalist design and does not indicate that restrictions on direct personal solicitation are unnecessary. The Constitution leaves to each state the responsibility for designing a judicial system that meets the needs of its citizenry. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Each state that elects judges seeks to strike a proper balance between the judicial candidate's needs for campaign resources and the state's goal of ensuring the independence and integrity of its judiciary. Just like the judicial qualification requirements at issue in *Gregory*, this is "a decision of the most fundamental sort for a sovereign entity." *Id.* at 460.

The granularity of the policy decisions involved in constructing a regime for regulating judicial conduct counsels deference to state decision-making. In adopting judicial conduct and campaign-finance rules for state judges, a state must choose carefully among a virtually unlimited set of options. The optimal

policy choice may vary based on state-specific factors such as a state's history of judicial misconduct or campaign-finance violations, a state's legal culture, or a particular rule's track record of effectiveness in a given state. This Court's general reluctance to constitutionalize such policy choices, *cf. DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202-03 (1989), should apply with special force here, where invalidation of a specific Code restriction would have the effect of overriding the policy choices of a separate sovereign constitutionally empowered to make those choices.

Federal courts' authority to prevent the encroachment of state government on citizens' liberties should be exercised with due regard for each state's sovereign interest in designing a judicial system that reflects the state's history and values, while balancing competing constitutional interests. Some states may permit large group solicitations, others may not. Some states may prohibit individualized mailings but allow mass mailings. Most, if not all, would proscribe solicitation in the courthouse. Unless an essential liberty is put into jeopardy by the state's particular choice, care should be exercised so that each state retains an essential feature of sovereignty — the right to construct a mode of government that responds to the expressed desires of its citizens.

F. *This Court Should Not Entertain an Overbreadth Challenge to the Solicitation Canon.*

For the reasons stated above, the Conference respectfully submits that the Codes' restrictions on

direct solicitations, including restrictions on direct mass mailing, comply with the First Amendment. But in any event, a facial challenge to these regulations — such as an overbreadth challenge — is inappropriate in this case. As this Court cautioned, the "strong medicine" of the overbreadth doctrine should be employed "sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). Overbreadth is a special type of facial challenge available only in the free speech context. *See United States* v. *Stevens*, 559 U.S. 460, 473 (2010). Whereas the traditional facial challenge requires a plaintiff to "establish that no set of circumstances exists under which the Act would be valid," *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), the overbreadth doctrine permits invalidation of a speech restriction where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotations omitted).

The overbreadth doctrine is designed for situations where the law may be constitutionally applied to the challenger, but the challenger contends that a substantial number of other applications would be unconstitutional. As this Court cautioned,

> It is not the usual judicial practice, ... nor ... generally desirable, to proceed to an overbreadth issue unnecessarily — that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary

> means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws.

Bd. of Trustees v. *Fox*, 492 U.S. 469, 484-85 (1989); *see also Stevens*, 559 U.S. at 484 (Alito, J., dissenting) ("The 'strong medicine' of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court.").

Principles of judicial restraint counsel against embarking on an overbreadth inquiry prior to rejection of the as-applied challenge. *See Fox*, 492 U.S. at 484-86. "Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *Wash. State Grange*, 552 U.S. at 450 (internal quotation omitted). Furthermore, "[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Id.* at 450 (internal quotation marks and citation omitted). This is such a barebones record, as it is unknown how many litigants or potential litigants Petitioner solicited.

The overbreadth doctrine "was designed as a 'departure from traditional rules of standing,' to enable persons who are themselves unharmed by the defect in a statute nevertheless 'to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others." *Fox*, 492 U.S.

at 484 (quoting *Broadrick*, 413 U.S. at 610, 613). Here, however, Petitioner has been disciplined under Canon 7C(1) of the Florida Code of Judicial Conduct, and needs no additional incentive to challenge the solicitation restriction at issue.

Moreover, it is unclear whether Petitioner has even preserved an overbreadth or other type of facial challenge. Petitioner's argument to the Florida Supreme Court was that the solicitation restriction was "unconstitutional to the extent that it prohibits a judicial candidate from signing a mass mailing solicitation letter." Initial Br. of Resp't, *Fla. Bar* v. *Williams-Yulee*, No. SC11-265, 2012 WL 5275028 at *12 (Fla. Sept. 10, 2012) (capitalization removed). Indeed, Petitioner conceded below that "[i]t is possible that Florida's Canon 7(C)1 could survive strict scrutiny analysis if it didn't prohibit a judicial candidate from signing a mass mailing solicitation." Reply Br. of Resp't, *Fla. Bar* v. *Williams-Yulee*, No. SC11-265, 2012 WL 8944669 at *7 (Fla. Oct. 29, 2012). This Court does not entertain issues not raised below, *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975), and certainly not issues conceded below.

Petitioner also fails to explain (with the sole exception of speeches before large gatherings, *see* Pet. Br. 23) why the other applications of the Florida solicitation restriction would not be narrowly tailored to the compelling state interests at issue. Like other analogous provisions of the Codes, Florida Canon 7C(1) would also apply to in-person solicitation by a judge from the bench, in-person solicitation in the courthouse (including during court breaks or immediately following a court session), in-person face-to-face solicitation, in-person solicitation of a

small group, in-person solicitation by telephone, and solicitation in a targeted mailing (including a mailing addressed to current or frequent litigants). These situations present an even greater threat to the impartiality of the judiciary, and to the appearance of impartiality, than a direct mass mailing, and are therefore firmly within "the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (internal quotation marks and citation omitted).

Petitioner "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists," *Virginia* v. *Hicks*, 539 U.S. 113, 122 (2003) (quoting *N.Y. State Club Ass'n* v. *New York*, 487 U.S. 1, 14 (1988)) (alterations in original), and this Court "do[es] not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law," *Wash. State Grange*, 552 U.S. at 449 n.6 (internal quotation marks and citation omitted). In such circumstances, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *N.Y. State Club Ass'n*, 487 U.S. at 14 (internal quotation marks omitted).[5] This Court should not take up the difficult task of assessing the constitutionality of the solicitation restriction's numerous potential applications where Petitioner has

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[5] Petitioner's failure to address these situations, as well as her failure to preserve the facial challenge below, *see supra* at 32, are likewise fatal to a facial challenge made under the *Salerno* standard, which would require Petitioner to establish that "no set of circumstances exists under which the [law] would be valid." *Salerno*, 481 U.S. at 745.

not demonstrated that they would not be narrowly tailored to the compelling state interests of preserving judicial impartiality and the appearance of impartiality.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the Conference of Chief Justices respectfully requests that this Court uphold the constitutionality of the restrictions on direct personal solicitations of the state Codes of Judicial Conduct.

Respectfully submitted,

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December 2014

AMICUS CURIAE BRIEF

13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

—v.—

THE FLORIDA BAR,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR *AMICI CURIAE* SUBMITTED ON BEHALF OF RESPONDENT BY NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, AND JOHN SHATTUCK AS PAST LEADERS OF THE AMERICAN CIVIL LIBERTIES UNION

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QUESTIONS PRESENTED

1. Whether the restrictive First Amendment rules enunciated by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) and its progeny limiting attempts to regulate the funding of electoral campaigns for legislative and executive office are fully applicable to electoral campaigns for judicial office?

2. Whether Florida's flat ban on the personal solicitation of campaign contributions from attorneys by candidates for judicial office violates the First Amendment?

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No. 13-1499

IN THE
Supreme Court of the United States

LANELL WILLIAMS-YULEE,
Petitioner,

v.

THE FLORIDA BAR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

INTEREST OF *AMICI CURIAE* AND STATEMENT OF POSITION[1]

Amici curiae, past leaders of the American Civil Liberties Union, have devoted much of their careers to the defense of the First Amendment and Equal Justice Under Law. Norman Dorsen is the Frederick I. and Grace A. Stokes Professor of Law and co-director of the Arthur Garfield Hays Civil Liberties Program at NYU Law School. He served as ACLU General Counsel from 1969-1976, and as its President from 1976-1991. Aryeh Neier has recently retired as President of the Open Society

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

Foundations. He served as ACLU Executive Director from 1970-1978. Burt Neuborne is the Inez Milholland Professor of Civil Liberties at NYU Law School. He was a member of the legal staff of the ACLU for eleven years, serving as National Legal Director from 1981-85, and as a member of the New York City Human Rights Commission from 1988-92. John Shattuck is President and Rector of Central European University in Budapest. He served as National Legislative Director of the ACLU from 1976-1984, as Assistant Secretary of State for Democracy, Human Rights and Labor from 1993-98, and as Ambassador to the Czech Republic from 1998-2000.

This case presents the Court with its first opportunity to consider the First Amendment ground rules governing efforts by the states to regulate the financing of judicial elections. *Amici* urge the Court to adopt a First Amendment paradigm governing the financing of judicial elections that reflects and reinforces the complex role of an American judge as both an impartial applier of existing law, and a creative force in the making of new law for the common good.

SUMMARY OF ARGUMENT

The restrictive First Amendment rules enunciated by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and its progeny reflect the Court's understanding of the functioning of our rough and tumble representative democracy, where resources are often unequal, and elected representatives are expected to in favor their electoral supporters, including their financial supporters. It would, *amici* believe, be a

serious mistake for the Court to transpose the *Buckley* rules to the judicial election context without carefully considering whether their operation would jeopardize the principles of Equal Justice Under Law.

Most importantly, since behavior that would not corrupt the proper operation of the Court's vision of a "winner take most" representative democracy would unquestionably erode the principles of strict equality and unwavering impartiality that are the hallmarks of the American judicial process, *amici* urge the Court to assure that First Amendment constraints on regulation of the funding of judicial election campaigns do not jeopardize public confidence in the operation of the judicial process itself.

STATEMENT OF THE CASE

Whether the rationale is a desire to: (1) safeguard attorneys from undue pressure to contribute to a judicial election campaign; (2) insulate judges against being tempted (either consciously or subconsciously) to favor generous attorney/donors; or (3) foster a public image of strict judicial impartiality, the vast bulk of the 39 states that have chosen to elect some or all of their judges have also elected to ban candidates for judicial office from soliciting campaign funds personally from attorneys.[2] Most states that elect judges, including Florida, ban judicial candidates from personally

[2] The two major exceptions are Texas and California, neither of which regulates the personal solicitation of campaign contributions from attorneys by candidates for judicial office.

soliciting campaign contributions from attorneys, even in the context of a mass mailing directed to the general public.[3] Instead, they permit judicial candidates to rely on authorized third-parties who are free to solicit campaign funds supporting the judicial candidate from the general public, including attorneys.

Petitioner, a candidate for judicial office in Florida, unwittingly violated Canon 7 (C) (1) by circulating a personally signed mass mailing soliciting campaign contributions from the general public, including attorneys. The Florida Supreme Court recognized that the text of Canon 7(C) (1) is ambiguous, and that petitioner had acted under a good faith, plausible mistake of law,[4] but, nevertheless, imposed a disciplinary sanction of public reprimand on her. Petitioner contests the

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[3] Canon 7 (C)(1) provides in relevant part:

"A candidate...for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support...."

According to petitioner, thirteen states exempt mass mailings to the general public (or speeches to large groups) from the personal attorney solicitation ban. Many of those states provide an exemption, however, only because Circuit courts have required them to do so. See *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir 2005) (en banc); *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010).

[4] The Florida Supreme Court found that petitioner believed in good faith that Canon 7(C) (1) did not apply until a declared opponent emerged. Pet. App. at 27a. Since the applicability of Canon 7 (C) (2), dealing with retention elections, turns on the existence of a declared opponent, petitioner's mistake of law was plausible.

disciplinary sanction, arguing that she was entitled under the First Amendment to solicit campaign contributions personally pursuant to a signed mass mailing directed to the general public, including attorneys.[5]

ARGUMENT

FIRST AMENDMENT RULES GOVERNING THE FUNDING OF JUDICIAL ELECTIONS SHOULD REFLECT AND REINFORCE THE UNIQUE NATURE OF THE AMERICAN JUDICIAL PROCESS

INTRODUCTION

A decade ago, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), this Court invalidated a state regulation banning candidates for judicial office from discussing controversial public issues. The *White* Court ruled that if a state chooses to elect its judges, it must, under the First Amendment,

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[5] Petitioner does not appear to have argued that her good faith, reasonable mistake of law should constitute a First Amendment-based defense. If, however, as the Court has recently held, police officers enjoy a good faith mistake of law defense in connection with the administration of the 4th Amendment (see *Heien v. North Carolina*, ___ U.S.___ (December 15, 2014)), speakers may well enjoy a similar defense as an extension of this Court's First Amendment *scienter* and void-for-vagueness jurisprudence. See *Elonis v. United States*, Docket No. 13-983 (awaiting decision); *Smith v. California*, 361 U.S. 147 (1959); *Smith v. Goguen*, 415 U. S. 566 (1974). Since the possible existence of a mistake of law defense has not been briefed or argued, the Court may wish to remand this case to the Supreme Court of Florida to permit reconsideration in light of *Heien* and *Elonis*.

permit free discussion of public issues relevant to the casting of an informed vote. 536 U.S. at 787-88. The Court's decision in *White* laid the First Amendment foundation for modern, issue-driven state judicial elections. The *White* Court had no occasion, however, to consider the constitutional ground rules governing how such judicial election campaigns are to be financed.

In beginning the process of mapping the relationship between the First Amendment and efforts to regulate the funding of judicial elections, *amici* urge the Court to assure that the constitutional ground rules governing the funding of judicial elections reflect and reinforce the unique nature of the American judicial process. American judges, no matter how they are selected, perform three crucial functions in administering Equal Justice Under Law. First, they preside over (and often carry out) fact-finding that shapes the narrative underlying a case or controversy. Second, they search for, identify, and apply pre-existing law (both textual and judge-made) to the facts of a case. Finally, unlike judges in many other countries dedicated to the rule of law, American judges routinely exercise power to make new law by altering the common law, overturning or reinterpreting past judicial precedent, and/or interpreting ambiguous statutory and constitutional text. The performance of each of the three judicial functions calls for a complex and varying mix of constrained and discretionary judicial behavior involving high levels of legal expertise, coupled with strict, unwavering impartiality and equal treatment.

Given the complexity and technical difficulty inherent in carrying out the multiple functions assigned to an American judge, it is very often impossible for litigants and the general public to assess either the quality or the impartiality of a judge's behavior. In the end, therefore, continued public confidence in judicial outcomes (especially unpopular judicial outcomes) is deeply dependent on continued public confidence in the integrity, fairness, and impartiality of the judicial process itself, including the manner in which judges are s/elected

A. Highly Restrictive First Amendment Ground Rules Governing the Financing of Legislative and Executive Elections Are Poorly Suited to the Regulation of Judicial Elections

In the almost 40 years since this Court's foundational decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court has imposed highly restrictive First Amendment norms on efforts to regulate the financing of legislative and executive elections. Inevitably, the First Amendment norms enunciated by the Court have reflected the Justices' understanding of the proper operation of our rough and tumble representative democracy, a contested political process that expects and encourages the winners of partisan elections to forge closer bonds with their political supporters, including their financial supporters, than with their political opponents. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1461-62 (2014) (citing Edmund Burke); *Citizens United v. FEC*, 558 U.S. 310, 356-61 (2010). Much behavior that would be deemed appropriate (or, at least, inevitable) in the partisan political process

would, however, be utterly destructive of a fair and impartial judicial process. The *White* Court itself recognized that the nature of the judicial process might call for electoral regulations that differ from regulations governing partisan political elections. 536 U.S. at 770, 780, 783. For example, political candidates have a First Amendment right to make campaign promises. *Brown v. Hartlage*, 456 U.S. 45 (1982). But judicial candidates, while they are free to discuss public issues, are not free to promise voters that they will effectuate particular changes in public policy because keeping such a promise would compromise the reality and appearance of strict impartiality and an open-minded willingness to be persuaded.

Even more dramatically, judicial elections are not governed by the one-person one-vote principle because, unlike political figures, judges do not represent an electoral constituency. *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095 (1973). American judges, even when they exercise the power to make new law, are expected to speak and act impartially on behalf of the entire community in a search for the common good. Unlike political figures, judges are not free, after their election, to form "the strictest union" with the voters who supported them. See 134 S. Ct. 1461 (quoting Edmund Burke).

It follows, therefore, that many First Amendment ground rules that are appropriate for a robust "winner take most" representative democracy would be deeply inappropriate, indeed destructive, in regulating the election of judges.

B. The First Amendment Postulates Governing Efforts to Regulate the Financing of Legislative and Executive Elections Are Not Applicable to the Effort to Regulate the Financing of Judicial Elections at Issue in This case

Constitutionally-based limits on efforts to regulate the financing of legislative and executive elections rest on four First Amendment postulates enunciated in *Buckley*:

(1) the raising and spending of money in the context of an election is "pure speech" protected by First Amendment "strict scrutiny" (424 U.S. at 15-19);

(2) the government's interest in preserving political equality does not justify imposing limits on campaign spending (*Id* at 48-49, n. 55);

(3) the government's interest in preventing "corruption," conceived narrowly as extortion or *quid pro quo* bribery, justifies the imposition of reasonable limits on the size of campaign contributions to a particular candidate (*Id* at 25-29); and

(4) independent campaign expenditures, as opposed to campaign contributions, do not pose a risk of extortion or *quid pro quo* corruption (*Id* at 45).

None of the four postulates is applicable to the effort to regulate the funding of judicial elections at issue in this case.

1. The Personal Solicitation of Campaign Contributions From Attorneys by Candidates for Judicial Office is Far Closer to "Communicative Conduct" Than It Is to "Pure Speech"

Buckley held that the twin acts of raising and spending campaign money in connection with legislative elections must be treated as the legal equivalent of "pure speech," rather than as a form of "communicative conduct,"[6] forcing virtually all efforts to regulate the funding of legislative and/or executive election campaigns to run the gauntlet of First Amendment strict scrutiny. First Amendment strict scrutiny, in turn, requires the government to demonstrate a "compelling governmental interest" in regulating speech that cannot be advanced by "any less drastic means." *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989).

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[6] The *Buckley* Court defended its equation of campaign money and speech by analogizing the relationship between the two to the link between gasoline and driving a car. In each setting, the amount of money or fuel determines how much speaking or driving can take place. Accordingly, reasoned the Court, raising and spending campaign funds must be treated as integral parts of the speech they enable. 424 U.S. at 19, n.18. With respect, however, a political campaign is not a simple drive in the country. It is a competitive race. And a race that depends on which driver has more fuel isn't worth watching. The current Court has, however, repeatedly equated campaign money and speech to the point where the linkage has become the cornerstone of the Court's campaign finance jurisprudence. With respect, *amici* agree with Justice Stevens that it is a cornerstone resting on intellectual sand.

Government efforts to regulate "communicative conduct," like burning a draft card or engaging in a protest march, are, on the other hand, tested under a less stringent First Amendment formula that asks whether the regulation is a narrowly tailored effort to deal with an important governmental interest that is unrelated to the viewpoint of the message. Eg,. *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding conviction for burning draft card to express opposition to Vietnam War); *Heffron v. International Society for Krishna Consciousness (ISKON)*, 452 U.S. 640 (1981) (upholding ban on leafleting and soliciting funds at crowded Minnesota State Fair, except from fixed booths); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Lee v. ISKON*, 505 U.S. 830 (1992) (upholding ban on solicitation of funds in airport; striking down ban on leafleting); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1994) (upholding ban on demonstrative sleeping by demonstrators in Lafayette Park). First Amendment strict scrutiny is usually lethal.[7] But, as *O'Brien*, *ISKON*, *CCNV* demonstrate, the government is more successful under intermediate First Amendment scrutiny precisely because the somewhat relaxed standard of review permits government a degree of prophylactic regulatory space.

Whatever the wisdom of treating the raising and spending of campaign money as "pure speech" in the context of a legislative election, however, the

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[7] For a rare—perhaps unique—example of a government regulation of "pure" speech that survived strict scrutiny, see *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding ban on electioneering within 100 feet of the polls).

personal solicitation of a campaign contribution from an attorney by a judicial candidate with the potential to affect the attorney's future professional life (and the lives of her clients) is much closer to "communicative conduct" than it is to "pure speech."[8] To the extent the distinction between pure speech and communicative conduct is anything more than conclusory, it attempts to capture the legal difference between an act of communication with no consequence other than the transmission of an idea (pure speech), and an act of communication that generates collateral, legitimately regulable by-products in addition to the communication of an idea (communicative conduct). For example, picketing, demonstrating, and burning draft cards each communicates a message. But each act of communication also generates by-products like obstruction of the public way and non-possession of a

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[8] This Court has considered the communicative aspects of soliciting funds in non-electoral contexts on numerous occasions. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)(invalidating tax on canvassers); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (invalidating standardless permit system); *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (invalidating overbroad regulation); *Heffron v. International Society for Krishna Consciousness (ISKON)*, 452 U.S. 640 (1981) (upholding ban on soliciting funds at crowded Minnesota State Fair, except from fixed booths); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (invalidating overbroad regulation); *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781 (1988) (invalidating limits on professional fundraisers); *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding ban on soliciting funds on government property); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Lee v. ISKON*, 505 U.S. 830 (1992) (upholding ban on solicitation of funds in airport; *Illinois v. Telemarketing Associates*, 538 U.S. 600 (2003) (upholding ban on misleading solicitation of funds).

draft card that, in the Court's view, justify a less stringent standard of review, allowing the government broader regulatory power, even when enforcement of the regulation impinges on the act's communicative aspects.

Applying the distinction to this case, the act of personally soliciting campaign funds from a potential subordinate clearly has a communicative aspect. As such, it qualifies for First Amendment protection. But a personal solicitation by a hierarchical superior, such as an employer or a judge with potential power to affect an attorney's professional life, carries with it a regulable by-product - a significant risk of undue pressure (real or imagined), and/or the currying of favor - that justifies government regulation, even prohibition of the practice. See *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding Hatch Act); *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (same); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding state "little Hatch Acts")

Accordingly, unlike the "pure speech" at issue in *Buckley*, personal solicitation of campaign funds from attorneys by a judicial candidate should trigger the intermediate level of First Amendment scrutiny applied in communicative conduct cases like *O'Brien*; a standard that asks whether the government interest is "important" (as opposed to "compelling), and whether the regulation is a "narrowly tailored" (as opposed to "the least drastic means") of advancing the government's interest.

2. The Advancement of Equality in the Context of Judicial Elections Constitutes a "Compelling" Governmental Interest Justifying a Ban on the Personal Solicitation of Campaign Funds from Attorneys By Candidates for Judicial Office

The *Buckley* Court declined to recognize the preservation of political equality as a "compelling governmental interest" that would justify limits on massive campaign spending by the extremely rich, including corporations under *Citizens United v. FEC*, 558 U.S. 310 (2010). More precisely, the *Buckley* Court recognized that the preservation of the ideal of political equality is an extremely important interest, but invoked the "least drastic means" prong of strict scrutiny to argue that electoral equality in the context of legislative elections must be advanced by the less drastic means of subsidizing the weak speakers, not limiting the spending of the strong ones. 424 U.S, at 48-49, n.55.

In the years since *Buckley*, the Court has repeatedly rejected efforts to justify campaign finance regulation on the basis of equality. See *Davis v. FEC*, 554 U.S. 724 (2008) (striking down waiver of contribution limits for legislative candidates facing extremely wealthy opponents); *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011) (invalidating public funding scheme designed to match the amounts raised by privately funded candidates); *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). . On each occasion, the Court has stressed the availability of less drastic means for advancing

electoral equality. The Court's rejection of egalitarian justifications for regulating the funding of legislative electoral campaigns rests, therefore, on an antecedent finding that First Amendment strict scrutiny applies. Without that antecedent finding, there is no requirement that the government utilize the "least drastic means" to advance its asserted interest in regulation. "Narrowly tailored" regulations are sufficient.

As *amici* have demonstrated *supra*, strict scrutiny is not applicable to viewpoint-neutral regulations banning the personal solicitation of campaign contributions from individuals who are subject to the hierarchical authority of the person seeking the funds.[9] And, as the Court's decisions in *O'Brien*, *Letter Carriers*, *Broadrick*, and *ISKON* demonstrate, the existence of a potential less drastic means is not necessarily lethal in First Amendment settings that are not governed by strict scrutiny.[10] Accordingly, states are free to invoke "narrowly tailored" means to protect egalitarian values in the context of regulating the personal solicitation of campaign contributions from attorneys by candidates for judicial office, without being required to utilize the alternative of public funding.

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[9] For a particularly egregious example of the coercive solicitation of campaign funds by hierarchical superiors, see *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir), cert. denied, 483 U.S. 1021 (1987).

[10] For example, in *O'Brien*, although the government's interest in requiring possession of a draft card could have been advanced by requiring that a replacement card be obtained immediately, as with lost or stolen draft cards, the Court did not require the government to use such a less drastic means.

Even more importantly, the concept of equality differs in judicial and political settings. One of the joys of practicing law in American courtrooms is the judicial system's intense (and still evolving) commitment to treating each litigant equally, no matter how rich or poor they may be. See *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) (invalidating effort to limit arguments available to indigent clients represented by federally-funded lawyers). While equality is also an important ideal in the political realm, the spectacle of well-financed candidates being able to purchase substantially more time with the electorate than poorly-financed candidates, while disturbing to some, is tolerated by the Court as a fact of political and economic life. *LSC v. Velazquez* demonstrates, however, that the Court's response would be far different if procedural rules permitted the permissible length of Supreme Court briefs, or the amount of argument time before the judge or jury, to be auctioned to the highest bidder. In a judicial system where equal justice under law is more than a slogan, the importance of preserving the reality (and appearance) of strict equality in the operation of the judicial process cannot be overestimated.

A campaign finance regime that leaves wealthy individuals, for-profit corporations, and well-funded special interests wholly free to expend unlimited sums in securing the election of judges of their choice will inevitably erode the sense that courts provide an equal, level playing field for all. It is bad enough that unlimited campaign spending has eroded the real world value of the luminous principle of "one-person one-vote" to the point where millions of ordinary Americans have lost faith in the democratic

process.[11] It would be nothing short of tragic if, as the result of massive uncontrolled campaign spending in judicial elections, Americans come to view the election of their judges as a matter of "one-dollar one vote," resulting in a judiciary no longer seen as impartial.

3. The Concept of "Corrupting" the Judicial Process Is Far Broader Than Engaging in Extortion and/or *Quid Pro Quo* Bribery

The *Buckley* Court held that prevention of the reality or appearance of "corruption" of the representative democratic process is a compelling governmental interest that justifies prophylactic limits on the amount of campaign contributions to a given candidate.[12] Later cases like *Citizens United*

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[11] *Amici* believe that the torrent of campaign spending by the ultra-rich has spawned levels of cynicism and anomie in the general public about the impact of big money that is eroding faith in American democracy, contributing to an anemic national voter turnout in the 2014 elections that has been preliminarily estimated at 36.4% of the eligible electorate, the lowest rate of democratic participation in 72 years. See www.electionproject.org/2014g. If the preliminary figures are accurate, *amici* fear that the real winner in the 2014 elections was lack of faith in democracy itself.

[12] The Court noted that campaign contributions (as opposed to campaign expenditures) are a form of "indirect" speech entitled to somewhat diminished First Amendment protection. 424 U.S. at 24-29. The Court reasoned that the process of transferring cash from contributor to candidate provides a fertile opportunity to extort support, or to trade political influence for cash. *Ibid.* In the years since *Buckley*, the Court has upheld contribution limits of $1,075 in statewide elections (*Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), but invalidated Vermont's $400 cap on statewide contributions because the Court found it implausible to believe that a $401

and *McCutcheon* restricted the nature of the feared "corruption" to extortion and/or the *quid-pro-quo* trading of votes for money. The Court reasoned in both *Citizens United and McCutcheon* that, in the context of partisan politics, we expect (indeed encourage) elected legislative or executive officials to discriminate on the basis of political views, favoring their political supporters (including their financial supporters), and rejecting their political opponents. In such a system of "winner take most" representative democracy, a majority of the Court has opined that unequal access to an elected official, keyed to financial support, is not corruption. It is, the Court observed, only natural for an elected official to listen more closely to those supporters, including financial supporters, who have been instrumental in securing the official's election.

If one accepts a vision of partisan representative democracy as a place where the spoils belong to the victors, and where elected officials function primarily as agents of the people who supported their election, financially and otherwise, it is, indeed, difficult to corrupt such a process by anything other than extortion and/or bribery. On the other hand, if one believes in Edmund Burke's vision of representative democracy, a vision that occasionally calls on elected representatives to exercise independent judgment in a search for the common

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dollar contribution could corrupt anyone (*Randall v. Sorrell*, 548 U.S. 230 (2006). In *McCutcheon v. FEC*, *supra*, the Court reaffirmed the validity of the $5,200 cap on contributions to a federal candidate, but invalidated a $123,500 cap on total contributions to all federal candidates in a single election cycle as inadequately linked to the *quid pro quo* corruption of a particular candidate.

good,[13] such a more disinterested representative democracy is vulnerable to "corruption" whenever a representative's behavior is likely to be inordinately influenced, not by her independent judgment of what is best for all, but by her beliefs about what is best for herself, and her largest campaign contributors.

Whether or not, however, the Court was justified in ignoring Edmund Burke's vision of a partially disinterested representative democracy in determining what types of behavior risk "corrupting" the representative democratic process, judges, including elected judges, are different. Selfish, discriminatory behavior that is tolerated, expected, even applauded in the Court's vision of partisan representative democracy would almost certainly be viewed as corrupt if committed by a judge, or a judge's financial supporters. The very essence of judicial impartiality is to avoid favoring supporters, especially financial supporters. Elected judges (as opposed to elected representatives) may neither follow political commands from their supporters, nor seek to advance the narrow interests of their campaign contributors. Unlike elected representatives, who speak for their constituencies,

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[13] With respect, the majority opinion in *McCutcheon* incompletely describes Edmund Burke's complex ideas on the role of a democratic representative. 134 S. Ct. at 1461. It is true that Burke urged a close relationship between an elected representative and her constituents. But the very speech cited in *McCutcheon*, Burke's celebrated Address to the Electors of Bristol, argued for Burke's duty to cast a vote on a tariff bill based upon his independent judgment of what was best for all, not on what the overwhelming majority of his constituents wanted. The complete address is reproduced in The Founders' Constitution, Representation, chapter 13, reproduced at press.pubs.uchicago.edu/founders/documents/v1ch13s7.html.

judges, including elected judges, speak for us all in applying pre-existing law impartially, and in generating new law that will advance the common good. In fact, elected judges engaged in the uniquely American practice of judicial lawmaking may well be the last pure Burkean figures in American democracy.

Given the vast difference between the roles of self-interest and partiality in the political and judicial processes, it would, *amici* believe, be a dangerous mistake to apply the narrow idea of "corruption" generated in the context of a vision of the representative political process as driven by political partiality, and a desire to capture the largest slice of any available pie, to the judicial process, where elected judges seek to apply pre-existing law with strict impartiality, and pledge to make new law only to advance the common good. In short, behavior that would not corrupt a political system of representative democracy premised on favoring an elected representative's political supporters would be utterly destructive of a judicial system pledged to equal justice under law.

Viewed through a broader lens of what counts as "corruption" of the judicial process, the action of judges in personally soliciting campaign contributions from attorneys who may someday appear before them, even in the context of mass mailings to the general public, might well lead litigants and reasonable observers to question the impartiality of a judge's rulings involving those generous attorneys who responded particularly favorably to the judge's personal campaign solicitations.

4. This Court Has Recognized That Independent Expenditures in Support of a Judicial Candidate May Cause Real or Apparent Corruption of the Judicial Process

The *Buckley* Court also held that independent expenditures in support of a candidate for legislative office do not pose a risk of corruption comparable to the risk posed by a direct contribution. The Court reasoned that campaign contributions carry a unique potential for extortion and a *quid pro quo* agreement to trade votes for money because campaign contributions often involve personal contact between a candidate and donor prior to the transfer of funds; a personal contact that the Court deemed non-existent in the context of independent expenditures. 424 U.S. at 45.

With respect, the *Buckley* Court appears to have overlooked the fact that many, perhaps most, independent expenditures are not one-shot events. To the extent that independent expenditures recur over multiple election cycles, ample opportunity exists for ongoing *quid pro quo* corruption driven by gratitude for past support, and the hope of future expenditures.

Whether or not, however, the *Buckley* Court was correct in ignoring the potential for corruption inherent in ongoing independent expenditures that transcend a single election cycle, this Court has recognized that independent expenditures in support of a judicial candidate may induce (or appear to induce) partiality towards the donor on the part of a judge who owes his election, in part, to the

donor/litigant's generous support. In *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), an elected appellate judge who had enjoyed massive independent campaign support from a litigant before him was obliged under the Due Process clause to recuse himself to avoid the appearance (and the possible unconscious reality) that he would favor his campaign benefactor. Florida's ban on personal solicitation of campaign contributions from attorneys by candidates for judicial office is a prophylactic effort to make such agonizing *post hoc* recusal proceedings unnecessary.

Given the ease by which a judicial candidate may raise campaign funds through solicitation by third persons, *amici* believe that foregoing personal solicitation of attorneys is a small price to pay to avoid a practice that would trigger time-consuming recusal motions, and inevitably erode the appearance of strict impartiality that is central to the maintenance of public confidence in the judicial process.

C. Measured by the Appropriate Intermediate First Amendment Standard of Review, Florida's Ban is a Viewpoint-Neutral, Narrowly-Tailored Means of Advancing an Important Governmental Interest

The precise "as applied" First Amendment issue before the Court is whether a sufficient reason exists to ban a candidate for judicial office from *personally* soliciting campaign contributions from attorneys in the context of mass mailings or Internet communications directed to the general public,

instead of authorizing third-persons to solicit the funds on the candidate's behalf. In short, from the standpoint of: (1) the solicited attorney; (2) the future judge; or (3) the general public's faith in the judicial system, is there anything special about a judge's *personal* solicitation of campaign funds from attorneys that justifies Florida's ban?

As *amici* have noted, the Court has already recognized the importance of personal solicitation of campaign funds, basing its distinction between the potentially corrupting nature of campaign contributions and independent expenditures solely on the presence or absence of a personal relationship between candidate and donor. Given the Court's recognition of the unique aspects of personal solicitation of campaign funds, petitioner's argument that Florida's flat ban is not narrowly-tailored within the meaning of *O'Brien* cannot succeed.

Petitioner argues that since thirteen states exempt personally signed mailings soliciting campaign funds from the general public, it follows that attorneys submerged in the general public will not feel pressure to contribute, and that the public will not believe that judges might favor attorneys who respond generously to such a personally-signed mass mailing. Most of the remaining 26 states have, however, opted not to gamble on whether the mass mailing exemption risks: (1) unduly pressuring attorneys to contribute; and (2) eroding public faith in the impartiality of the judiciary. Given the high stakes, and the states' crucial federalism-based interest in autonomously shaping their elected

judiciaries,[14] this Court should defer to Florida's decision to opt for risk averse regulation, especially since Florida provides a prospective judicial candidate ample alternative opportunities to engage in fundraising through third-parties.

Amici believe, therefore, that a reasonable Florida regulator should be permitted to view the marginal First Amendment value of a personally signed mass mailing seeking judicial campaign funds (as opposed to one signed by a judicial candidate's supporters) as outweighed by the risk that: (1) attorneys may view the personal solicitation as a form of undue pressure; and (2) litigants and the general public may believe that judicial behavior may be influenced by an attorney's response (or non-response) to a judge's personal solicitation.

There is, of course, a degree of risk-averse prophylaxis in Florida's approach that might well be forbidden under First Amendment strict scrutiny. But the essence of the move from strict to intermediate First Amendment scrutiny is a decision to permit the government to take reasonable, non-discriminatory steps to deal with what it reasonably believes to be risk of a serious harm closely intertwined with a communicative act. Florida's decision to ban candidates for public office from engaging in the personal solicitation of campaign funds from attorneys, no matter what the context, is entitled to that level of regulatory deference.

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[14] See *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (construing Age Discrimination Act to permit states to set mandatory retirement ages for judges).

CONCLUSION

For the above-cited reasons, *amici* urge that the decision of the Florida Supreme Court be affirmed. In the alternative, the Florida Supreme Court should be invited to consider the applicability of *Heien v. North Carolina* and *Elonis v. United States* to this case.

Respectfully submitted,

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Dated: December 24, 2014
New York, New York

AMICUS CURIAE BRIEF

No. 13-1499

In The
Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Florida

BRIEF FOR FREE SPEECH FOR PEOPLE AND THE HONORABLE JAMES C. NELSON AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE

With the parties' consent, amici curiae file this brief in support of Respondent The Florida Bar.[1]

Free Speech For People is a national non-partisan, non-profit organization that works to restore republican democracy to the people, including through legal advocacy in the constitutional law of campaign finance. Free Speech For People's thousands of supporters around the country engage in education and non-partisan advocacy to encourage and support effective government of, by, and for the American people.

The Honorable James C. Nelson is a retired Justice of the Montana Supreme Court. He served in that capacity for nearly twenty years, from 1993 to 2013. While on that Court, Justice Nelson wrote a highly-regarded dissenting opinion that addressed the dangers of excessive money in our political system. See *W. Tradition P'ship v. Att'y Gen.*, 271 P.3d 1, 34-36 (Mont. 2011) (Nelson, J., dissenting), rev'd *sub nom. Am. Tradition P'ship* v. *Bullock*, 132 S. Ct. 2490 (2012). In his 2004 election campaign, he found it necessary to personally solicit campaign contributions,

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than amici, their members, or their counsel contributed monetarily to preparation or submission of this brief. Counsel of record received timely notice of the intent to file the brief under Rule 37.2(a), and granted consent. The consent letters have been lodged with the Clerk of this Court.

which is allowed in Montana. Justice Nelson has been an outspoken advocate for civil rights, and he continues to write and speak publicly regarding the dangers of unfettered political spending by wealthy and corporate interests, including the effect of such spending on judicial elections. Justice Nelson is also a member of the Board of Directors of Free Speech For People. He participates as an amicus curiae in this matter in his individual capacity.

SUMMARY OF ARGUMENT

Florida's personal solicitation clause is justified by the state's interest in preserving the dignity of the judiciary. Preservation of judicial dignity underlies judicial ethics regulation across a broad range of electoral and non-electoral contexts, and (along with other interests, *e.g.*, impartiality) supports the challenged clause because a state may properly determine that personal solicitation by a judge detracts from the dignity of judicial office. Moreover, petitioner's "narrow tailoring" arguments do not apply to the dignity interest.

The dignity of the judiciary is compelling because it grounds our legal system. From the smooth functioning of everyday courtroom proceedings to the public legitimacy of controversial legal decisions, our system depends in large part on treating judges as entitled to a special degree of respect. Consequently, preservation of the dignity of the judiciary has long

been recognized as justifying conduct and speech limits on courtroom participants. But just as importantly, state and federal judiciaries have developed rich ethics codes designed to preserve judicial dignity *outside* the courtroom. These codes hold judges to a particularly high standard even in their personal lives, because judges do not merely administer the law – they *symbolize* the law. For that reason, judges (like police officers) are subject to discipline for personal conduct and speech that is legal but undignified.

In that vein, Florida's judicial ethics code (like many others) embodies the principle that personal fundraising by a sitting or prospective judge is undignified, whether in the context of charitable organizations, political parties, or the judge's own election campaign. The injury to the dignity interest occurs when solicitees and the public observe a judge – who may hold or seek the power of life and death – stooping to asking for handouts. When a judge acts as a supplicant (before anyone, but especially before the very lawyers who will appear in her court) it detracts from the dignity of the judicial office.

The personal solicitation clause in Canon 7C(1) of the Florida Code of Judicial Conduct is narrowly tailored to the compelling interest in preserving judicial dignity because it prohibits precisely the activity that detracts from that dignity: fundraising solicitations from the judge herself. Petitioner's arguments that the clause is under- or over-inclusive are oriented towards attacking a different compelling

government interest, and simply do not apply to the dignity interest. The clause's connection to the state's dignity interest is not threatened by hypotheticals involving *someone else* personally soliciting donations, or a judge soliciting something *besides* money. The precise injury that the state has identified to judicial dignity is a sitting or prospective judge *herself* asking for *money*, whether in person, by phone, or in writing. That is precisely what the clause prohibits, while leaving open ample opportunities for others to ask for money, or for the judge to ask for other things. It hardly poses an excessive burden on judicial candidates to insist that fundraising requests be made in the names of campaign volunteers or staff, rather than those who may sit in judgment of life and death.

ARGUMENT

I. The dignity of the judiciary is a compelling state interest.

The state and lower federal courts have invoked three principal categories of interests in support of personal solicitation restrictions for judicial candidates: (1) preserving judicial *impartiality* or integrity, *e.g.*, *Siefert* v. *Alexander*, 608 F.3d 974, 989 (7th Cir. 2010) (noting interest to "preserve judicial impartiality"); Pet. App. 10a (noting interest in "protecting the integrity of the judiciary"); (2) preserving the *appearance* of (i.e., public confidence in) judicial impartiality, *e.g.*, *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990) (noting

"the state's interest in maintaining, not only the integrity of the judiciary, but also the appearance of that integrity"); Pet. App. 10a (noting separate interest in "maintaining the public's confidence in an impartial judiciary"); and (3) preventing coercion (or its appearance) when judges solicit lawyers or litigants who may appear before them, *Stretton* v. *Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991) (noting interest in preventing "the coercive effect, or its appearance").

These interests are complemented by another government interest – the *dignity* of the judiciary – which serves as a fundamental justification for longstanding traditions, laws, and principles of judicial ethics that apply to judicial conduct in general, and judicial election campaigns in particular. Protection of judicial dignity is compelling because respect for judges and courts is important for smooth courtroom functioning and democratic legitimacy of judicial decisions – in sum, for maintaining the rule of law. Many longstanding and well-accepted restrictions on judicial conduct and speech – including prohibitions on charitable solicitations and political fundraising for other candidates – are justified to a substantial degree by the interest in preserving judicial dignity. The conduct proscribed by the canon at issue in this case (campaign fundraising solicitation by sitting or aspiring judges) poses an even greater threat to judicial dignity than that other prohibited conduct.

A. Tradition, law, and judicial ethics establish the government's interest in preserving the dignity of the judiciary.

Judicial dignity begins with the laws and traditions of the courtroom itself, which are designed to command respect for the judge:

> Court sessions generally commence when the bailiff says, "All rise for the Honorable. . . ." The judge then enters the room wearing judicial robes and takes his or her seat on an elevated platform; the gallery is seated; and the parties' first words to the court or judge are, "May it please the court" or "Your Honor."

Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. Pa. L. Rev. 169, 193-194 (2011). This demand for respect derives originally from "the aristocratic tradition of according dignity, and thus deference, to high-ranking institutions and officers." *Id.* at 194. But it is no mere vestige; as explained in Part I.B, *infra*, it remains an essential feature of our judicial system because it is necessary for smooth courtroom functioning. Consequently, it is enforceable through the contempt power. "Courts independently must be vested with 'power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and . . . to preserve themselves and their officers from the approach and insults of pollution.'" *Int'l Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 831 (1994) (alteration in original) (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204,

227 (1821)). Moreover, the law does not claim a bright-line distinction between the dignity of the *court* and the dignity of the *judge*. At trial, "the court is so much the judge and the judge so much the court that the two terms are used interchangeably * * * and contempt of the one is contempt of the other," such that any contempt of court in a judge's presence is "an offense against his dignity." *Sacher* v. *United States*, 343 U.S. 1, 12 (1952).

This power to protect the dignity of the judiciary within the courtroom was familiar to the Founders and already well established by the time the First Amendment was enacted. See Judiciary Act of 1789 § 17, 1 Stat. 83 (authorizing federal courts to "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same") (codified as amended at 18 U.S.C. 401); 4 William Blackstone, *Commentaries on the Laws of England* *126 (1765) ("threatening or reproachful words to any judge sitting in the courts" are punishable by imprisonment, and "even in the inferior courts * * * contemptuous behavior, is punishable with a fine by the judges there sitting"). And it is now considered "unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile* v. *State Bar*, 501 U.S. 1030, 1071 (1991).

But outside the courtroom, judges do not *enforce* the dignity of the judiciary. Rather, they are *restricted*

in their speech and conduct by pervasive ethics regulations designed to preserve that dignity.

Preservation of judicial dignity is a general principle undergirding the entire structure of judicial ethics regulation. But it is also can be an enforceable requirement in its own right. Outside the election context, canons of judicial ethics have long prohibited extrajudicial activities that would "detract from the dignity of the judge's office," Code of Conduct for U.S. Judges, Canon 4; ABA Model Code of Judicial Conduct (1972), Canon 5A, or, in a more recent formulation, "demean the judicial office," Fla. Code of Judicial Conduct, Canon 5A(3); ABA Model Code of Judicial Conduct (1990), Canon 4A(2);[2] see also ABA Canons of Judicial Ethics (1924), Canon 4 ("A judge's official conduct should be free from impropriety and the appearance of impropriety * * * and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day [*sic*] life, should be beyond reproach.").

That is because judges do not just *administer* the law; they *symbolize* the law. See *In re Sanders*, 145

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[2] The most recent revision of the ABA model code removes references to dignity in specific rules, in favor of a catch-all principle that "[j]udges should maintain the dignity of judicial office at all times." ABA Model Code of Judicial Conduct (2007), pmbl. ¶ 2. Since Florida (like nearly half the states) has not adopted the ABA's 2007 revisions, all subsequent references herein are to the 1990 model code.

P.3d 1208, 1213 n.16 (Wash. 2006) (en banc) ("Judges are the symbol of the law, and as such their actions reflect upon the judicial system."). Thus, states can hold judges to "the *highest possible* standard of ethical conduct." *In re Harper*, 673 N.E.2d 1253, 1261 (Ohio 1996) (citation omitted; emphasis added).

Under this standard, judges have been disciplined for personal conduct and speech that is legal but undignified, and thus casts the judge (and by implication the judiciary as a whole) into disrepute, even if it would be constitutionally protected for an ordinary citizen. See, *e.g.*, *In re Flanagan*, 690 A.2d 865 (Conn. 1997) (disciplining judge for consensual affair with married court reporter); *In re Tschirhart*, 371 N.W.2d 850, 853 (Mich. 1985) (disciplining judge for flippant media remarks about his visit to a Nevada brothel, and noting that "[w]hen a judge's character and morals come into question not only do the people lose respect for him as a person, but worse, respect for the Court over which he presides is lost as well").

This distinguishes judges from other elected officials. While a legislator, mayor, or governor who conducted an affair or made flippant statements about a lawful brothel visit might suffer politically for poor judgment, he would not be subject to legal discipline. But judges are subject to a higher standard of personal comportment, in order to protect the dignity of the judiciary. Even for purely "personal conduct," a judge must "accept freely and willingly restrictions that might be viewed as burdensome by

the ordinary citizen." Code of Conduct for U.S. Judges, Canon 2A cmt.; Fla. Code of Judicial Conduct, Canon 2A cmt. For example, in the context of online activities, a requirement that a judge's extrajudicial activities not "demean the judicial office" requires a higher standard of decorum:

> Online activities that would be permissible and appropriate for a member of the general public may be improper for a judge. While it may be acceptable for a college student to post photographs of himself or herself engaged in a drunken revelry, it is not appropriate for a judge to do so.

Judicial Ethics Comm., Cal. Judges Ass'n, Op. No. 66, *Online Social Networking* 5 (Nov. 23, 2010), *at* http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf. Since publicly posting such a photograph does not raise questions of judicial bias or courtroom competence, the best analysis of this example is protection of judicial dignity. Cf. Fla. Code of Judicial Conduct, Canon 2A cmt. ("Irresponsible * * * conduct by judges erodes public confidence in the judiciary.").

In this respect, judges are akin to police officers, who also symbolize the law itself, are given special power and responsibility, and must meet a higher standard of personal conduct and speech than the general public. For that reason, courts have sustained disciplinary actions against police for off-duty conduct that is legal but "unbecoming" an officer. See, *e.g.*, *City of San Diego* v. *Roe*, 543 U.S. 77 (2004) (per curiam) (rejecting First Amendment challenge to

dismissal of police officer for making and selling sexually explicit videos); *Harper* v. *Crockett*, 868 F. Supp. 1557 (E.D. Ark. 1994) (rejecting First Amendment challenge to discipline of police officer who was publicly rude to bank teller while off-duty). Military officers must similarly avoid "conduct unbecoming an officer and a gentleman." 10 U.S.C. 933.[3] Many such "conduct unbecoming" offenses, such as public rudeness, would be constitutionally protected for civilians under the First Amendment. But those who wear the uniform – or the robe – must meet a higher standard.

In the election context, judges and judicial candidates[4] in Florida must "maintain the dignity appropriate

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[3] Under this rubric, officers are subject to discipline for (otherwise) legal but "unbecoming" conduct or speech. See, *e.g.*, *United States* v. *Czekala*, 38 M.J. 566, 574-576 (A.C.M.R. 1993) (affirming "conduct unbecoming" conviction based on specifications of adultery and wrongful divorce, and noting that refusal to pay debt can also constitute offense even for debt later discharged in bankruptcy), aff'd, 42 M.J. 168 (C.A.A.F. 1995). The justification for this provision is that "[i]n military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." *Fletcher* v. *United States*, 26 Ct. Cl. 541, 563 (Ct. Cl. 1891), rev'd on other grounds, 148 U.S. 84 (1893).

[4] Florida's judicial election provisions, like those of the ABA model code, apply to judicial *candidates*, not just sitting judges. See Fla. Code of Judicial Conduct, Canon 7A(1); ABA Model Code of Judicial Conduct, Canon 5C(2). The state's judicial dignity interest applies to non-incumbent candidates because (1) the actions of declared candidates for judicial office reflect on the judiciary; (2) candidates might *become* sitting judges; and

(Continued on following page)

to judicial office." Fla. Code of Judicial Conduct, Canon 7A(3)(b); ABA Model Code of Judicial Conduct, Canon 5A(3). For example, judicial candidates have been disciplined for campaign conduct or speech that might be acceptable in a race for legislative or executive office, but is undignified for a sitting or prospective judge. See, *e.g.*, *Disciplinary Counsel* v. *Evans*, 733 N.E.2d 609, 611 (Ohio 2000) (finding that neglecting to supervise campaign volunteer who arranged for prison inmates to build campaign signs violated dignity canon); *In re Bybee*, 716 N.E.2d 957, 963 (Ind. 1999) (per curiam) (finding that candidate's knowing misrepresentations about incumbent judge's record violated dignity canon). This is no mere nicety, but rather vital to the rule of law itself:

> Maintaining the dignity of the Judiciary is necessary to protect the rule of law – a root principle of our social compact and the one sure standard upon which this diverse and frequently fractious nation believes it can rely. * * * It does not exaggerate to say that the concept has an iconic status and that faith in the rule of law is akin to a civil religion. Judges are symbols of the rule of law. Therefore, those who aspire to judicial office have a special responsibility – a duty in fact – to

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(3) applying electoral restrictions *only* to sitting judges would create pro-challenger imbalances. These practical reasons for applying the same standards to incumbents and non-incumbents justify extension of dignity-based restrictions to non-incumbent judicial candidates.

> conduct themselves in their campaigns with a dignity that reflects and honors the public's reverence for the unique office they seek.

Md. Judicial Campaign Conduct Comm., *Campaign Conduct Handbook 2014*, at 3 (Feb. 2014), *at* http://www.mdjccc.org/pdfs/campaignconducthandbook2014.pdf.[5]

B. The dignity interest is compelling because courts depend on respect for their authority.

Preserving the *dignity* of the judiciary is compelling because it furthers public acceptance of the *authority* of the judiciary. And courts require respect for that authority in order to function.

At the most mundane level, smooth functioning of a courtroom requires largely voluntary cooperation from a wide array of participants: lawyers, litigants, witnesses, jurors, reporters, and spectators. From minor (but countless) orders in everyday motion practice to verdicts in bench trials, from orderly oral arguments to jury instructions, from compliance with local practice customs to the very quiet and order in the courtroom, all follow in part from a fundamental respect for the judge – not just the abstraction of "the judiciary," but the person wearing the robe.

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[5] The Maryland Judicial Campaign Conduct Committee is a non-governmental citizens' committee formed at the request of (and with a chair appointed by) the Chief Judge of the Maryland Court of Appeals. *Id.* at 1.

That respect comes not only from the fear of contempt, professional discipline, or removal from the courtroom. These remedies must remain available in extreme cases, but courts could not function if they had to be exercised regularly. Rather, courtroom functioning depends on the participants respecting the judge precisely because he or she is the judge, and entitled to an unusual degree of respect in our otherwise informal and often cacophonously disrespectful society. That is why, when oyez is called, all *do* rise, speak in proper turn, and generally cooperate with the judge in creating and maintaining a respectful and orderly proceeding even when it is highly adversarial. Our legal culture recoils from disruptive courtroom tactics, such as in the "Chicago Seven" trial. See *In re Dellinger*, 461 F.2d 389, 396 (7th Cir. 1972) (describing counsel's repeated insults to judge). In other countries or legal systems that lack respect for the judiciary, administration of justice can be severely compromised. See, *e.g.*, Michael P. Scharf, *Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials*, 39 Case W. Res. J. Int'l L. 155, 156-165 (2007) (cataloguing types of disruptive tactics and summarizing major historical trials characterized by disruption). Describing the risks of such courtroom tactics (and other uncivil behavior), Chief Justice Burger warned of "the jungle * * * closing in on us and taking over all that the hand and brain of Man has created in thousands of years, by way of rational discourse and in deliberative processes, including the

trial of cases in the courts." Hon. Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 212 (1971).

Similarly, when *judges themselves* act in an undignified manner, the public loses respect for the judiciary. In Wisconsin, after an unusually mean-spirited (and the nation's second-most expensive) state supreme court election in 2011, followed by accusations of one justice choking another, an independent poll found that "Wisconsin voters' confidence in their Supreme Court had fallen to just 33 percent, down from 52 percent only three years earlier." Alicia Bannon et al., Brennan Ctr. for Justice, *The New Politics of Judicial Elections 2011-12*, at 9 (Oct. 2013), *at* http://perma.cc/8FN9-YQH2. But subtler encroachments upon judicial dignity can also erode respect and legitimacy for the judiciary. For that reason, judicial ethics principles attest that "[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." Fla. Code of Judicial Conduct, Canon 1 cmt.

Judicial dignity is particularly important for the rule of law in "hot-button" cases. As Alexander Hamilton argued, the judiciary is the "least dangerous" branch because it "has no influence over either the sword or the purse" and "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *The Federalist* No. 78, at 465 (Clinton Rossiter ed., 1961). The power of judicial opinions and orders thus stems from the public legitimacy of the judiciary's authority. And when judges

stand up to the legislative and executive branches, which *do* control the purse and sword respectively, it is essential for the rule of law that the authority of the least dangerous branch be accepted by the more dangerous branches. The judicial pen is only mightier than the executive sword when public respect for the judiciary demands it so.

There may be no perfect solution to the problem of preserving the dignity of the judiciary. But most states, like the federal courts, impose some requirement that judges maintain "dignity" to sustain the respected position of judges as answerable to higher codes of conduct than the rest of society (including elected politicians) as part of a comprehensive scheme designed to promote the rule of law.

Of course, the dignity interest is intertwined with other interests underlying states' election-related judicial ethics provisions. Indiana's former Chief Justice has catalogued four distinct bases for the judicial ethics codes' restrictions on judges' speech and conduct, the first of which corresponds to the dignity interest: "The American tradition sets judges aside from the hurly-burly of sometimes unseemly political strife. We place courts and judges on a higher plateau and hope that in doing so they will act the part and ask us to do the same on matters of importance." Hon. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1067 (1996). Depending on the scenario, the dignity interest may not always take center stage, and courts pair discussion of the dignity

interest with other complementary interests. See, *e.g.*, *In re Chmura*, 608 N.W.2d 31, 40 (Mich. 2000) (treating preservation of the "appearance of fairness and impartiality" and "protecting the reputation of the judiciary" as separate interests, and finding them *both* compelling for First Amendment purposes). But the fact that the dignity interest does not always have the starring role does not diminish its compelling nature.

To be sure, the interest in judicial dignity is not limitless. See *Bloom* v. *Illinois*, 391 U.S. 194, 208 (1968) (acknowledging "the need to further respect for judges and courts," but holding that it does not overcome the Sixth Amendment right to jury trial in criminal contempt cases); *Bridges* v. *California*, 314 U.S. 252 (1941) (holding that contempt citation issued for publishing criticism of court during pending litigation violated First Amendment). As against third parties, outside the courtroom, it may not be compelling at all. But as to the conduct of *judges themselves*, preservation of the dignity of the judiciary is a compelling interest.

C. States can properly conclude that the spectacle of judges hustling for money would detract from judicial dignity.

A state could properly conclude that the sight of judges jockeying for donations would diminish respect for judges, in the eyes of lawyers, litigants, the media, and the public. Well-accepted judicial ethics principles

have long limited judges' solicitation of money for other purposes, such as charitable or political fundraising. See Fla. Code of Judicial Conduct, Canons 4D(2)(a) (providing that a judge "shall not personally or directly participate in the solicitation of funds" for charitable or civic organizations), 7A(1)(e) (prohibiting fundraising for a "political organization or candidate"); Code of Conduct for U.S. Judges, Canons 4C, 5A(3). Indeed, with some exceptions, a judge may not even "be a speaker, guest of honor, or otherwise be featured at an organization's fund-raising event." Fla. Code of Judicial Conduct, Canon 5C(3)(b) cmt.; Code of Conduct for U.S. Judges, Canon 4C cmt.

Once again, the interest in preserving judicial dignity is interwoven with related interests. For example, when judges solicit money for these organizations, "the person solicited [may] feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control," Fla. Code of Judicial Conduct, Canon 5C(3)(b) cmt., and the process "may create an impression that those who heed the judge's solicitation are in special favor with the judge," Judicial Ethics Comm., Cal. Judges Ass'n, Op. No. 33, *Solicitation of Funds for Defense Before the CJP* 3 (1986), *at* http://www.caljudges.org/files/pdf/Op%2033%20Final.pdf. But these non-electoral solicitation bans are also rooted in the principle that "[i]t demeans the judicial office for a judge to ask others for money for any purpose, even a charitable one." *Ibid.*

This prohibition does not require evidence that a particular fundraising activity is *especially* undignified.

Some activities may stand out in that way. See, *e.g.*, N.Y. State Advisory Comm. on Judicial Ethics, Op. No. 90-28 (Mar. 1, 1990) (opining that a judge may not judge a church fundraiser's "grease pole and lumberjack contests" not only because it was connected to fundraising, but also because it "would be too prominent and undignified"), *at* http://www.nycourts.gov/ip/judicialethics/opinions/90-28.htm. But the dignity interest need not be limited to extreme cases.

Rather, a state may determine that personal solicitation of donations by judges, *as a category*, diminishes the dignity of the judiciary. The judicial role is grave. Florida could properly conclude that respect for its judiciary is diminished by the spectacle of men and women who on the one hand seek the awesome power of life and death,[6] but on the other hand ask for handouts to keep their jobs.[7] Of course, Florida already provides a general requirement for judicial candidates to "maintain the dignity

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[6] Florida judges can impose death on a capital defendant despite a unanimous jury vote for life. See Fla. Stat. § 921.141(3) (describing judicial override procedure).

[7] This case does not involve the superficially analogous scenario of prohibitions on judges lobbying legislatures for salary increases. That said, judicial ethics often prohibit judges from appearing before government bodies except in specific defined circumstances. *E.g.*, ABA Model Code of Judicial Conduct, Canon 4C(1) ("A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.").

appropriate to judicial office" in their campaigns. Fla. Code of Judicial Conduct, Canon 7A(3)(b). In essence, Florida (like most states with elected judiciaries) has determined that personal solicitation of contributions is *per se* undignified, and supplemented the general prohibition with a specific one.[8]

A former Texas Chief Justice put it well: when judges solicit money for contributions, "[t]he 'ask' is undignified, and the 'give' is fairly compelled." Hon. Wallace Jefferson, *Reform from Within: Positive Solutions for Elected Judiciaries*, 33 Seattle U. L. Rev. 625, 625 (2010); see also Hon. John Paul Stevens, *The Meaning of Judicial Activism*, 25 Chicago Bar Ass'n Rec. 42, 43 (May 2011) ("[I]t is inappropriate, if not demeaning, for a candidate for judicial office to ask lawyers and potential litigants for gifts or loans of money.").[9] The judge descends to the

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[8] It is irrelevant whether a particular judicial candidate feels that personal solicitation is or is not injurious to the candidate's *personal* dignity. The people have concluded that the *category* of judicial personal solicitation diminishes the dignity of the *judiciary*. Cf. *United States* v. *Wilson*, 421 U.S. 309, 317 n.8 (1975) (noting in contempt context that "[i]n order to constitute an affront to the dignity of the court [the] judge himself need not be personally insulted."). Similarly, it is irrelevant whether a particular solicitee does or does not have a diminished respect for a specific judge, or the bench in general, as a result of a solicitation.

[9] Of course, soliciting contributions can also be demeaning for legislative or executive candidates. See, *e.g.*, Hon. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 613 (1982) (describing presidential candidates' "task of begging

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position of a supplicant – always damaging to judicial dignity, but especially so when the solicitee is a lawyer who may appear before the judge. The entreaty neutralizes or reverses a deference relationship that the legal system works hard to create and maintain in the interest of the rule of law. Moreover, the injury to judicial dignity is even greater when a judge is soliciting for her own campaign, as opposed to a charitable organization, because she is essentially seeking validation of her own ability to do the job, and a favor so that she can get (or keep) that job. This is not a new concern: in 1888, a noted Chicago civic reformer, criticizing Illinois's lower court system, lamented "the astounding spectacle * * * of a judge asking for patronage" and a system "calculated to destroy every idea of judicial dignity." Joseph W. Errant, *Justice for the Friendless and the Poor*, in *Proc. of the Ill. State Bar Ass'n* 75, 77-78.

Finally, where personal solicitation is *permitted*, it may as a practical matter be *required*. If *some* judicial candidates personally solicit contributions, then only wealthy, well-connected, or unusually confident

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for funds from large contributors" as "demeaning"). But the Court may recognize judicial dignity as a compelling state interest supporting personal solicitation restrictions even if it would not uphold analogous restrictions in *non*-judicial elections. Legislators and executive officers exercise powers of purse and sword, see *The Federalist* No. 78, *supra*, at 465, and it might be dangerous to recognize their dignity as a compelling interest. By contrast, the "least dangerous" branch, *ibid.*, *requires* dignity in order to function effectively.

candidates would refrain from dialing for dollars. Thus, the dignitary harm to the judiciary caused by the practical requirement to personally solicit funds may impede the judiciary's ability to attract strong candidates. Those who would be excellent judges and able campaigners, but resist the abasement of direct personal fundraising, will avoid judicial service. As California's Chief Justice observed of judicial elections more broadly, "[m]any qualified men who would otherwise grace judicial office cannot bring themselves to run through such a gamut." Hon. Roger J. Traynor, *Who Can Best Judge the Judges*, 53 Va. L. Rev. 1266, 1276 (1967); see also Roy A. Schotland, *Six Fatal Flaws: A Comment on Bopp and Neeley*, 86 Denv. U. L. Rev. 233, 243 (2008) ("What kind of election campaign looms at the entry to the bench is a significant filter affecting who will seek a seat or seek re-election.").

A state could determine that its courts' legitimacy is optimized if the people can select judges democratically, but the judges are slightly removed from the fundraising process. No contradiction lies in the ideas that a judge should submit to periodic elections, yet should not in the meantime conduct herself like "a 'merchant' who goes from door to door 'selling pots,'" *Breard* v. *City of Alexandria*, 341 U.S. 622, 650 n.* (1951) (Black, J., dissenting).

II. Florida's personal solicitation clause is narrowly tailored to its interest in preserving the dignity of the judiciary.

A. The provision is narrowly tailored because it prohibits precisely the speech causing the harm to judicial dignity.

The personal solicitation clause in Canon 7C(1) of the Florida Code of Judicial Conduct is a carefully crafted solution that enables judicial candidates to raise sufficient campaign funds without soiling the dignity of judicial office in the process: "[i]t permits the judge to obtain funds to carry out a campaign but eliminates the specter of contributions going from the hand of the contributor to the hand of the judge." *Fadeley*, 802 P.2d at 41. And this "limitation on the ability to raise funds need not cause the campaign to suffer, if the judge picks good people for his or her campaign finance committee." *Ibid.* It is narrowly tailored because it addresses *precisely* the conduct that detracts from judicial dignity (personal fundraising) while leaving open ample alternative opportunities for judicial campaigns to raise necessary funds. For this reason it is unlike the "announce clause" invalidated in *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002). The solicitation clause does not "censor what the people hear," *id.* at 794 (Kennedy, J., concurring); it simply regulates which part of the judicial campaign apparatus makes the pitch.

Petitioner, citing the Sixth Circuit, argues that the personal solicitation clause favors "'incumbent

judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders.'" Pet. Br. 21 (quoting *Carey* v. *Wolnitzek*, 614 F.3d 189, 204 (6th Cir. 2010)). But these arguments are backwards. The personal solicitation clause "does not have a pro-incumbent character." *Simes* v. *Ark. Judicial Discipline & Disability Comm.*, 247 S.W.3d 876, 883 (Ark. 2007). To the contrary, the personal solicitation clause deprives incumbent judges of one of their most potent advantages over challengers:

> Limiting candidates' "requests" obviously has more impact on incumbents, whose "requests" carry more weight. As a Pennsylvania lawyer said in explaining his contribution to a local judge (to whom many local lawyers contributed "although they doubted [his] qualifications"): "What could I say? He was a sitting judge."

Schotland, 86 Denv. U. L. Rev. at 249 (alteration in original); Jefferson, 33 Seattle U. L. Rev. at 625 ("[L]awyers are shrewd enough to avoid the risk of incurring a judge's disfavor."). Similarly, it is precisely the "well-connected" who can best take advantage of legalized personal solicitation, by directly contacting those to whom they are so well connected. And as for petitioner's argument that the system favors wealthy self-financing candidates, that undesirable flaw inheres in *any* electoral system since this Court's

invalidation of spending restrictions in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and cannot fairly be attributed to this narrow judicial ethics rule, which simply requires that someone else place the call or sign the letter.

B. The provision is neither under- nor over-inclusive.

Petitioner argues that the personal solicitation clause is both under- and over-inclusive with respect to the state's interests in preventing judicial corruption or bias. Pet. Br. 17-26. This argument simply does not apply to the state's dignity interest.

First, petitioner argues that the prohibition is under-inclusive because it does not prevent judicial candidates from learning who contributed. Pet. Br. 18-19. But the dignity interest is not based on what the *judge* perceives about the *solicitees*: it is based on what the *solicitees* and the public perceive about the *judge*. There is, in fact, a difference between a letter signed by a prospective judge and a personal request from "the candidate's best friend," *Carey*, 614 F.3d at 205. A fundraising letter mass-mailed by a sitting or prospective judge shows a person seeking life-or-death power stooping to the level of direct-mail techniques used to sell magazine subscriptions. A request from the candidate's best friend, or paid campaign manager, may well raise substantial concerns with respect to *other* compelling interests, such as prevention of bias or its appearance, but it does

not directly impinge upon judicial *dignity*. Nor does the fact that the solicitees know that the solicitor is acting on the judge's behalf render the distinction meaningless. By analogy, in the court itself, it is understood that courthouse employees are acting as the judge's agents, even though they sometimes do things that might be undignified for the judge to do herself.

Second, petitioner argues that the prohibition is under-inclusive because it does not prevent judicial candidates from soliciting non-monetary support. Pet. Br. 20. But a state could conclude that asking for volunteer assistance is considerably more dignified than asking for a check. Florida makes a similar nuanced distinction with respect to non-profit organizations, providing that a judge "shall not personally or directly participate in the solicitation of funds," Fla. Code of Judicial Conduct, Canon 5C(3)(b)(i), but placing no express limits on solicitation of volunteer effort.[10]

Finally, petitioner argues that the clause is over-inclusive because it includes speeches at large gatherings, mass mailers, and letters posted on web sites. Pet. Br. 22-23. To be sure, the greatest harm to judicial dignity comes from "hand-to-hand" or direct

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[10] Petitioner also argues that the prohibition is under-inclusive because judges may learn who made independent expenditures on their behalf. Pet. Br. 20-21. The dignity interest is not implicated at all in this context.

phone solicitations. See, *e.g.*, Jefferson, 33 Seattle U. L. Rev. at 625 (providing an illustrative sample telephone transcript of a state supreme court chief justice soliciting a lawyer for donations). But one-to-many solicitations also detract from judicial dignity. When a judge speaks at a large gathering, the attendees may hope to be informed, educated, even inspired. Cf. ABA Model Code of Judicial Conduct, Canon 4B (judges may "speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects"). They might anticipate learning fine points of practice, grand principles of justice, or at least an update on court administration. When the judge speaks of such matters, the educational function of the judiciary is fulfilled. But when the judge's speech pivots to asking attendees to open their wallets, the dignity of the judiciary slowly drains away. And the affront to judicial dignity is not *diminished* by the fact that 100 attendees heard the pitch; rather, it is *magnified* by the presence of 100 witnesses.

While the harm to judicial dignity caused by personally signed mail solicitations – *e.g.*, the mass mailer signed by petitioner and posted on her campaign web site – may be less in degree, it is of the same quality. The recipient of a fundraising letter opens her mail to find, amongst the bills, preapproved credit card offers, and magazine subscription solicitations, a letter from a sitting or aspiring judge, asking the recipient to check a box and return a check or a

credit card authorization in an enclosed pre-addressed envelope. When the letter comes from a campaign committee, the reputation and image of the judge at least sit at some remove, but when the letter is signed by the judge herself, all pretense is lost.

The curious visitor to the judge's web site has a similar experience: after browsing the judge's biography and perhaps a statement of judicial philosophy, she builds a sense of how that judge will exercise the weighty powers of her office, only to click another tab and see that the dignified jurist has posted a personal plea for dollars to whichever random strangers might happen upon her web site. Florida may properly conclude that this is not good for the dignity of the judiciary, and impose the very modest requirement that someone else sign the request.[11]

Some of the majesty of the judiciary may already be irretrievably lost. But it hardly poses an excessive burden for judicial candidates to insist that fundraising requests be posted in the names of campaign personnel, rather than those who may sit in judgment of life and death.

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[11] The fact that some states have decided not to regulate personal solicitation in mass mailings or speeches to large groups, or to regulate personal solicitation at all, does not mean that Florida's canon is over-inclusive. It simply means that some states have decided not to regulate constitutionally regulable solicitation.

CONCLUSION

Florida's personal solicitation clause is narrowly tailored to a compelling government interest in preserving the dignity of the judiciary. The Court should affirm the judgment of the Florida Supreme Court.

Respectfully submitted,

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December 2014

AMICUS CURIAE BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF MAJOR B. HARDING, HARRY LEE ANSTEAD, STEPHEN GRIMES, NEAL ROTH, JOHN M. HOGAN, BUDDY SCHULZ, JOHN A. DEVAULT, III, HENRY M. COXE, III, RICHARD H. LEVENSTEIN, NEAL R. SONNETT, BURTON YOUNG, AND EDWARD R. BLUMBERG AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

This *amici curiae* brief is submitted on behalf of three former chief justices of the Florida Supreme Court and nine active members of The Florida Bar (including four past presidents) in support of the brief filed by the Respondent.

Major B. Harding is a former Chief Justice of the Florida Supreme Court. Justice Harding was appointed to the Court by Florida Governor Lawton Chiles on January 22, 1991, and served until 2002. His tenure as Chief Justice lasted from 1998 to June 2000. Prior to being appointed to the Florida Supreme Court, Justice Harding served as a circuit judge for Florida's Fourth Judicial Circuit and as a Duval County juvenile court judge.

Harry Lee Anstead is a former Chief Justice of the Florida Supreme Court. Justice Anstead was appointed to the Court by Florida Governor Lawton Chiles on August 29, 1994, and served until January 5, 2009. His tenure as Chief Justice lasted from July 1, 2002 until June 30, 2004. Prior to being appointed to the Florida Supreme Court, Justice Anstead served as a judge on Florida's Fourth District Court of Appeal from 1977 to 1994.

Stephen Grimes is a former Chief Justice of the Florida Supreme Court. Justice Grimes was appointed to the Court by Governor Bob Martinez in January of 1987 and served until November of 1997. His tenure as Chief Justice lasted from April of 1994 to May of 1996. Prior to being

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[1] This *amici curiae* brief is filed with the written consent of both parties. Neither party nor party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person other than the *amici* or their counsel has contributed money that was intended to fund preparing or submitting this brief.

appointed to the Supreme Court, he served as a Judge of Florida's Second District Court of Appeal for thirteen years.

Neal Roth is a partner and co-founder of Grossman Roth, P.A., a law firm headquartered in Miami, Florida. Mr. Roth is a past president of the Florida Justice Association, which is dedicated to strengthening and upholding Florida's civil justice system and protecting the rights of Florida's citizens and consumers.

John M. Hogan is a partner at Holland & Knight, based in Miami, Florida. Mr. Hogan serves as the chair of Holland & Knight's firm-wide Litigation Section. Prior to joining the firm, Mr. Hogan served as Chief of Staff to the Attorney General of the United States, Acting United States Attorney for the Northern District of Georgia, Counselor to the Attorney General of the United States, Chief Assistant State Attorney for Miami-Dade County, and First Statewide Prosecutor of Florida.

George E. "Buddy" Schulz Jr. is a partner in Holland & Knight's Jacksonville, Florida office and is a Florida Bar Board Certified trial lawyer. Mr. Schulz is the past chairman of Holland & Knight's litigation department, and is presently the chair of the firm's Public and Charitable Service Department, which coordinates Holland & Knight's *pro bono* and community initiatives that provide assistance to persons of limited means and organizations that help them.

John A. DeVault, III, is a partner of Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., a law firm headquartered in Jacksonville, Florida. Mr. DeVault is a past president of The Florida Bar (1995-1996). He also served six years as a member of the Board of Governors of The Florida Bar and the House of Delegates of the American Bar Association. He is past chair of the Trial Lawyers Section of The Florida Bar, a founding Master of the Chester Bedell Inn of Court, and is Florida Bar Board Certified in Civil Trial and Business Litigation.

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Richard H. Levenstein is a partner in the law firm of Kramer, Sopko & Levenstein, P.A., in Stuart, Florida. He is a past president of the Martin County Bar Association, the founding President of the Justice Major B. Harding American Inn of Court, a past Secretary of the American Judicature Society, a national Trustee of the American Inn of Court Foundation, a member of the Lawyers Committee of the National Center for State Courts, and a fellow of the American Bar Foundation and Florida Bar Foundation. Mr. Levenstein is also an emeritus member of the Florida Bar's Constitutional Judiciary Committee and a member of The Florida Bar's Law Related Education Committee.

Neal R. Sonnett is the founding partner of Neal R. Sonnett, P.A., a Miami, Florida law firm. Mr. Sonnett has served on the American Bar Association Board of Governors and the ABA Nominating Committee, is a former chair of both the ABA Criminal Justice Section and the Section of Individual Rights and Responsibilities, and has served in the ABA House of Delegates for more than 25 years. He is a past president of the American Judicature Society, the Florida Bar Foundation, the National and Florida Associations of Criminal Defense Lawyers, the Dade County Bar Association, and the Spellman-Hoeveler American Inn of Court. Prior to entering private practice, Mr. Sonnett served as an Assistant United States Attorney and Chief of the

Criminal Division for the U.S. Attorney's Office of the Southern District of Florida.

Burton Young is the founding partner of Young, Berman, Karpf & Gonzalez, P.A., a Miami, Florida law firm. Mr. Young is a past president of The Florida Bar (1970-71), The Florida Bar Foundation, and the North Dade County Bar Association. He also served six years as a member of the House of Delegates of the American Bar Association. Mr. Young is a past chair of the Florida Supreme Court Chief Justice's Advisory Committee (1997), the Florida Supreme Court Historical Society (1996), the Florida Supreme Court's Select Committee to Study the Florida Bar Examiners (1994-1997), and the Florida Supreme Court Justice Gerald Kogan Oral History Program (1999). He is a recipient of the Medal of Honor from the Florida Bar Foundation and the "President's Award of Merit" from The Florida Bar, and was honored as a "Legal Legend" by the 11th Judicial Circuit Historical Society (Historical Museum of South Florida).

Edward R. Blumberg is president of Deutsch & Blumberg , P.A., a statewide trial practice located in Miami, Florida. He is board certified in civil trial law by the National Board of Trial Advocacy and The Florida Bar and tries cases on a regular basis. Mr. Blumberg served for eight years as a member of the Board of Governors of the Florida Bar, and, from 1997 to 1998, was its president. For six years, he served as a member of the House of Delegates of the American Bar Association and is a member of the American Board of Trial Advocates. Mr. Blumberg lectures on trial practice and ethics to lawyer groups on an ongoing basis. He also assists and provides advice to young lawyers through a Florida Bar program called Lawyers Advising Lawyers. He has written articles on ethics and professionalism for Bloomberg/BNA.

SUMMARY OF THE ARGUMENT

Canon 7C(1) serves a vital and important role in preserving the integrity of Florida's judiciary and maintaining the public's confidence in an impartial judiciary. Prior to the adoption of Canon 7C(1), there was widespread corruption and a lack of public confidence in Florida's judiciary. During the 1970's, four justices of the Florida Supreme Court (which were then elected positions) resigned their offices following corruption scandals. Several justices attempted to fix cases on behalf of campaign supporters. Another justice resigned after he was filmed on a gambling junket to Las Vegas paid for by a dog track that had a case pending before the high court, while others allowed themselves to be lobbied by a lawyer representing the public utilities industry in a case with major implications to the rate-paying public and even permitted him to ghostwrite the opinion for the Florida Supreme Court.

The direct solicitation ban was one of many canons and other reforms adopted by the State of Florida in order to address widespread corruption and regain public confidence in the judiciary. Given its unique history, Florida has an especially compelling governmental interest in preserving the integrity of its judiciary and maintaining public confidence in an impartial judiciary.

The invalidation of Canon 7C(1) would be especially disastrous for Florida, which is just one generation removed from some of the worst judicial corruption scandals in our state's history. Canon 7C(1) strikes a proper balance between a judicial candidate's right to free speech and the right of future litigants to due process, while placing a minimal burden on the former.

ARGUMENT

I. CANON 7C(1) WAS PART OF FLORIDA'S RESPONSE TO WIDESPREAD CORRUPTION AND LACK OF PUBLIC CONFIDENCE IN THE JUDICIARY

Canon 7C(1) has existed in Florida since 1973. It is part of the Florida Code of Judicial Conduct, adopted by the Florida Supreme Court that same year. *See In re The Florida Bar-Code of Judicial Conduct*, 281 So.2d 21 (Fla. 1973). Canon 1 states: "A judge should uphold the integrity and independence of the judiciary." To that end, Canon 2 states: "A judge should avoid impropriety and the appearance of impropriety in all his activities." To further the purposes of Canons 1 and 2, Canon 7C(1) prohibits judicial candidates, including an incumbent judge, from personally soliciting campaign contributions.[2] The purpose of this prohibition is to prevent the appearance of *quid pro quo*, bias or corruption, and to preserve the integrity of the judiciary and maintain the public's confidence in an impartial judiciary. As the Oregon Supreme Court cogently observed in upholding its state's prohibition against direct solicitation by judicial candidates:

> The stake of the public in a judiciary that is both honest in fact and honest in appearance is profound. . . . A judge's direct request for campaign contributions offers a quid pro quo or, at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity.

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[2] *See also* Fla. Code of Judicial Conduct, Canons 4D(2)(a) & 5C(3)(b)(i) (prohibiting judges from personally soliciting charitable contributions)

In re Fadeley, 310 Or. 548, 802 P.2d 31, 40 (Or. 1990) (quoted with approval in *The Florida Bar v. Williams-Yulee*, 138 So.3d 379, 387 (Fla. 2014))

The direct solicitation ban "insulates, to the extent possible, justices, judges and judicial candidates from those asked to make contributions to the campaign." *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1336 (Fla. 1990). As the Florida Supreme Court explained in *MacKenzie*, "this insulation of judges and judicial candidates reduces the possibility of a quid pro quo relationship and serves to avoid the appearance of impropriety." *Id.* The *MacKenzie* court also understood that running for a position in the judiciary is not the same thing as running for one in the legislature, stating that the appearance of impropriety or bias "is of special concern where the branch of government involved is that charged with the duty to remain impartial, i.e., the judiciary." *Id.*; *see also Siefert v. Alexander*, 608 F.3d 974, 990 n.7 (7th Cir. 2010) ("Legislators are not expected to be impartial; indeed, they are elected to advance the policies advocated by particular political parties, interest groups, or individuals. Judges, on the other hand, must be impartial toward the parties and lawyers who appear before them.").

Canon 7C(1) was adopted against the backdrop of extensive corruption occurring within the Florida judiciary. Prior to 1976, Florida Supreme Court justices were elected by popular vote.[3] But a number of scandals threatened to topple the high court. In what reads more like a novel than a history book, *A Most Disorderly Court*[4] recounts a dark period in

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[3] Martha W. Barnett, *The 1997-98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 Fla. L. Rev. 411, 420 n.44 (Apr. 2000)

[4] Martin A. Dyckman, *A Most Disorderly Court: Scandal and Reform in the Florida Judiciary*, University Press of Florida (2008) [hereinafter, "*A Most Disorderly Court*"]

Florida's history (during the early 1970s) in which four out of seven justices on the state's highest court resigned following corruption scandals. Two justices resigned in the face of impeachment proceedings.[5] Both had—among other things—tried to fix cases in lower courts on behalf of campaign supporters.[6] Another justice retired after being filmed on a "high-roller" gambling junket to Las Vegas paid for by a greyhound track with a case pending before the high court,[7]

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[5] Martin A. Dyckman, *How Florida Accepted Merit Retention: Nothing Succeeds Quite Like Scandal*, 64 Florida Law Review Forum 9 (2012) [hereinafter, "*How Florida Accepted Merit Retention*"]

[6] Justice David McCain, appointed to the Florida Supreme Court in 1970, tampered with a lower court on behalf of three campaign supporters appealing bribery convictions. When those efforts proved unsuccessful, he participated in a Florida Supreme Court decision that overturned the bribery convictions. A house subcommittee voted to propose McCain's impeachment after hearing scathing testimony of his attempts to fix the cases, but McCain boycotted the hearings and resigned before the house could vote on impeachment articles. *See* Martin A. Dyckman, *The Shoddy History of Politicized Courts*, Tampa Bay Times, Apr. 12, 2012; *How Florida Accepted Merit Retention*, *supra* note 3 at p. 13. In December 1970, Justice Hal P. Dekle (elected to the Florida Supreme Court in 1968) agreed to meet with a campaign supporter from Miami who was apprehensive over a real estate lawsuit pending in Panama City, Florida. Eight months later, while representing the high court at an investiture in Panama City, Justice Dekle approached W.L. Fitzpatrick, the circuit court judge presiding over the man's case. "Judge Dekle indicated very strongly to me that the defendants should prevail," Judge Fitzpatrick testified. After a subsequent telephone call in which Dekle reminded him of the matter, Judge Fitzpatrick recused himself. The Judicial Qualifications Commission (which had recently been created) heard of it, and, in May 1973, notified Justice Dekle that he was under investigation. After a hearing in January 1974, the commission voted him guilty of conduct unbecoming the judiciary but could not agree by the necessary nine votes (among thirteen members) on either a public or private reprimand. *Id.*; *A Most Disorderly Court*, *supra* note 2, at pp. 44-50.

[7] Justice Vassar Carlton, elected to the Florida Supreme Court in 1968, resigned before his term was up, not long after a Miami television station had filmed him rolling dice on a high-roller junket to Las Vegas. Tipped

while others allowed themselves to be lobbied by a lawyer representing the public utilities industry in a case worth millions of dollars to the rate-paying public and even permitted that lawyer to "ghostwrite" the opinion for the Florida Supreme Court.[8] Similar problems also existed at the

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off by a confidential source, investigative reporter Clarence Jones of the Miami television station WPLG followed Carlton on what appeared to be a subsidized junket to Las Vegas. "We didn't hide them [the cameras], and the photographer got this marvelous shot of me standing right behind Carlton as he threw the dice, a great big cigar in his mouth," Jones recalled. Jones' source had claimed that Justice Carlton's expenses were being paid by a Miami dog track that had a case before the high court; Carlton said that he had reimbursed whoever advanced them. Carlton resigned his judgeship shortly thereafter. *See A Most Disorderly Court*, *supra* note 2, at 19-21; Martin Dyckman, *The Shoddy History of Politicized Courts*, Tampa Bay Times, Apr. 12, 2011; Martin Dyckman, *Justice Carlton Resigns After 33 Years on Bench*, St. Petersburg Times, Jan. 17, 1974, at 1-B

[8] That scandal erupted from the first of two cases styled *Gulf Power Co. v. Bevis*, in which public utility companies appealed Public Service Commission (PSC) decisions pertaining to how much of Florida's new corporate income tax could be included in customer billings. When the Florida Supreme Court first heard the case in 1973, a five-justice panel evidently decided to give the utilities everything they wanted, and Justice Joseph A. Boyd (elected to the Florida Supreme Court in 1968) was assigned to write the opinion. But he first discussed it during a golf outing with a lawyer friend who was counsel for two utility companies that were *amici* in the case. The lawyer then prepared a "draft opinion," which he delivered personally to Justice Boyd. After Boyd's law clerk questioned the mysterious source, Boyd destroyed the evidence, tearing the document into "seventeen equal pieces," as he said later, and flushing them down a toilet. He then changed his vote to oppose the utilities. But Boyd did not know that the lawyer had also given another copy to Justice Hal P. Dekle, who, upon seeing that Boyd had voted the wrong way, used it to draft what was intended to be a majority opinion in favor of the public utilities. The lawyer visited Dekle twice while the decision was pending. The second time, Dekle dictated a note to a third justice—David McCain—through McCain's secretary: "HPD says that he thought you were with him on his 'dissent'; that [the lawyer friend] spoke to him on it but missed seeing you." Two law clerks who had seen Boyd's original document perceived Dekle's "dissent" as identical and alerted the then-

trial court level in Florida—during the late 1960's, a notorious circuit court judge required lawyers to walk the gauntlet past his bailiff and make an appropriate campaign contribution before they could present their argument.[9]

These incidents led to extensive judicial reforms in Florida, beginning with the adoption of the Florida Code of Judicial Conduct. In 1976, Florida amended its constitution and eliminated the direct election of appellate judges in favor of a merit selection and retention system.[10] That same year, the Florida Supreme Court created a Committee on Standards of Conduct Governing Judges (now known as the Judicial

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chief justice, Vassar Carlton, who ordered Dekle to rewrite it. It became something less than a full victory for the utilities. The law clerks still did not know the source of the *ex parte* document, but when they later saw the memo Dekle had dictated, they concluded that the offense was serious and that the court intended to cover it up. They leaked the memo to the St. Petersburg Times, whose front-page article prompted an investigation of Dekle and Boyd. The Judicial Qualifications Commission recommended that both be removed from office, but substitute judges the court assigned in place of all but one of the justices reduced the punishment to public reprimands. Reacting to intense criticism in the media and from members of The Florida Bar, House Speaker Donald L. Tucker ordered an impeachment investigation, during which Justice Dekle resigned. The investigating committee voted against impeaching Justice Boyd, subject to his undergoing a mental examination—which he passed. Boyd spent the rest of his life boasting that he was the only justice who had been "certified sane." *See A Most Disorderly Court*, *supra* note 2, at 1-16 & 117-119; *How Florida Accepted Merit Retention*, *supra* note 3 at 11-12.

[9] Gerald F. Richman, *The Case for Merit Selection and Retention of Trial Judges*, 72 Fla. B.J. 71 (Oct. 1998)

[10] Fla. Const., Art. V, § 10 (amended in 1976). Under the new system, voters would no longer choose from among several candidates, but would rather vote on whether a particular justice should be retained for another six-year term. *Id.* If the voters decided not to retain a particular justice, the governor would select his replacement. *Id.*, § 11. As a result of this constitutional amendment, only trial judges (at both the circuit court and county court levels) are subjected to contested elections in Florida.

Ethics Advisory Committee), authorizing the committee to render "written advisory opinions to inquiring judges concerning the propriety of contemplated judicial and non-judicial conduct." *Petition of Committee on Standards of Conduct for Judges*, 327 So.2d 5, 5 (Fla. 1976). The Florida Supreme Court subsequently authorized the committee to recommend changes to the Code of Judicial Conduct. *See Petition of Committee on Standards of Conduct for Judges*, 367 So.2d 625, 626 (Fla. 1979). From its inception, the committee has issued a large number of advisory opinions addressing questions raised with respect to each of the canons. The committee also presents campaign conduct forums for judicial candidates in all circuits with contested judicial elections. These forums teach the candidates about Canon 7 of the Code of Judicial Conduct, provide candidates with sources of guidance for campaign conduct, and inform them of possible sanctions for violating Canon 7. "These forums aid in maintaining a high level of integrity and professionalism among candidates for judicial office and in increasing public trust and confidence in the judicial system." JUDICAL ETHICS ADVISORY COMM., *An Aid to Understanding Canon 7: Guidelines to Assist Judicial Candidates in Campaign and Political Activities* (updated Nov. 2014) (available online at http://www.flcourts.org)

Additionally, a Judicial Qualifications Commission ("JQC") was created in 1972 pursuant to Article V, section 12 of the Florida Constitution. The JQC has the power to investigate and recommend to the Florida Supreme Court the removal from office of any justice or judge whose conduct "demonstrates a present unfitness to hold office, and to investigate and recommend the discipline of a justice or judge whose conduct . . . warrants such discipline." Fla. Const., Art. V, § 12. In 1997, Article V, section 12 of the Florida Constitution was amended to expand the range of disciplinary measures available for recommendation by the JQC and for imposition by the Florida Supreme Court. Prior

to 1997, the only disciplinary consequences of a violation of the Code were a public reprimand or removal from office. The revised article V, section 12(a)(1) defines "discipline" to include "fine, suspension with or without pay, or lawyer discipline." *See, e.g., In re Rodriguez*, 829 So.2d 857 (Fla. 2002) (judge suspended and fined $40,000 for Canon 7 violations including accepting contributions made for purpose of influencing judicial decisions and filing misleading campaign reports with the Division of Elections).

Together, these reforms have restored public confidence in an impartial judiciary. Since 1977, only 18 judges in Florida have been removed from judicial office for improper conduct. *See* Judicial Ethics Advisory Committee, *An Aid to Understanding Canon 7*, at pp. 4-5 (Nov. 2014).[11] Of the 18 judges that have been removed from judicial office, five were accused of Canon 7 violations.[12] Of the 79 judges whom the Florida Supreme Court has publicly reprimanded, 12 were accused of campaign violations of Canon 7.[13] Thus, Canon 7C(1) has been an effective—and essential—tool in severing the direct link between campaign contributors and judicial candidates that was at the heart of the destructive corruption scandals that infected Florida's judiciary during the 1970's.

Yet the threat remains. As recently as the late 1980's, Florida's judiciary became embroiled in another major corruption scandal. In 1989, federal authorities launched an undercover sting operation called "Operation Court Broom" to investigate allegations of corruption in the Circuit Court of

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[11] *See also A Most Disorderly Court*, *supra* note 2, at pp. 170-71

[12] *Id.* at p. 170. A sixth resigned from the bench and the bar after being convicted of concealing his net worth on a campaign financial disclosure statement. *Id.* at p. 171

[13] *Id.*

Miami-Dade County, Florida.[14] The two-year investigation resulted in the disclosure of a racketeering conspiracy by a handful of Miami-Dade County judges to suppress evidence, reduce bail, release the names of confidential informants, and otherwise fix criminal cases in exchange for cash payoffs.[15] The "Operation Court Broom" sting was the largest judicial corruption investigation in Florida's history,[16] and ultimately resulted in the convictions of three circuit court judges, two former circuit judges, six lawyers and one businessman.[17]

II. CANON 7C(1) FURTHERS A COMPELLING GOVERNMENT INTEREST IN PRESERVING THE INTEGRITY OF THE JUDICIARY AND MAINTAINING PUBLIC CONFIDENCE IN AN IMPARTIAL AND INDEPENDENT JUDICIARY

The invalidation of Canon 7C(1) could have especially dire consequences in Florida, which is only one generation removed from some of the worst judicial corruption scandals in our state's (and nation's) history. Given Florida's recent and unique history, there is no question that maintaining an impartial judiciary–the goal of Canon 7C(1)–is a compelling governmental interest (in all states, but especially in Florida). *See In re Amendment to the Code of Judicial Conduct – Amendments to Canon 7*, 985 So.2d 1073, 1075 (Fla. 2008) ("[W]e have held to be the compelling government interest in '[m]aintaining the

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[14] The facts of "Operation Court Broom" are recounted in several Eleventh Circuit opinions. *See United States v. Castro*, 89 F.3d 1443 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118, 117 S.Ct. 965 (1997); *United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118, 117 S.Ct. 965 (1997); *United States v. Massey*, 89 F.3d 1433 (11th Cir. 1996), *cert. denied*, 519 U.S. 1127, 117 S.Ct. 983 (1997)

[15] *Castro*, 89 F.3d at 1447; *Massey*, 89 F.3d at 1436

[16] Warren Richey, *'Court Broom Judge' Gets 15 Years in Corruption Case*, Ft. Lauderdale Sun-Sentinel, July 16, 1993

[17] Jim Farrell, *Job-Holder Took Payoffs in Florida*, Hartford Courant, July 16, 2005

impartiality, the independence from political influence, and the public image of the judiciary as impartial and independent.'") (quoting *In re Code of Judicial Conduct (Canons 1, 2 and 7A(1)(B))*, 603 So.2d 494, 497 (Fla. 1992)); *see also In re Kinsey*, 842 So.2d 77, 87 & n.7 (Fla. 2003) (citing cases and stating that "preserving the integrity of our judiciary and maintaining the public's confidence in an impartial judiciary" is a compelling governmental interest).

More than 60 years ago, Justice Felix Frankfurter penned a memorable definition of the importance of an independent judiciary, and those words ring no less true today:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Dennis v. United States, 341 U.S. 494, 525, (1951) (Frankfurter, J.) (concurring in affirmance of judgment)

Indeed, "an evenhanded, unbiased and impartial judiciary is one of the pillars upon which our system of government rests." *Ackerson v. Kentucky Judicial Retirement and Removal Com'n*, 776 F. Supp. 309, 313 (W. Ky. 1991) ("We have no difficulty in finding a compelling state interest in an impartial judiciary.") Over twenty years ago, the Oregon Supreme Court, in upholding a code of judicial

conduct similar to Florida's Canon 7C(1), articulated the compelling state interest served by the solicitation restriction:

> As we have elsewhere explained, the interest that Canon 7 B(7) . . . protects is the state's interest in maintaining, not only the integrity of the judiciary, but also the appearance of that integrity. The persons most actively interested in judicial races, and the persons who are the most consistent contributors to judicial campaigns, are lawyers and potential litigants. The impression created when a lawyer or potential litigant, who may from time to time come before a particular judge, contributes to the campaign of that judge is always unfortunate. Although many or most lawyers may act with pure motives, *viz.*, to ensure a qualified judiciary and to ensure vigorous public debate, the outside observer cannot but think that the lawyer or potential litigant either expects to get special treatment from the judge or, at the least, hopes to get such treatment. It follows that, if it is at all possible to do so, the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.
>
> So long as judges are chosen by the electoral process, it will be impossible to deny lawyers and potential litigants the right to give to campaigns or to deny judges the right to seek contributions. Both activities are too important in the scheme of things to permit either to be forbidden outright. . . . Some other, less intrusive method is needed.

> Canon 7 B(7) [which is similar to Florida's Canon) is that method. It permits the judge to obtain funds to carry out a campaign but eliminates the specter of contributions going from the hand of the contributor to the hand of the judge. The limitation on the ability to raise funds need not cause the campaign to suffer, if the judge picks good people for his or her campaign finance committee. It is true that the committee, however well suited to the task, may have trouble obtaining as much as the judge might have raised by personal buttonholing, but that is the point.

In re Fadeley, 802 P.2d at 40

As *Fadeley* acutely observed, the campaign finance rules governing judicial elections are necessarily (and should be) more restrictive than those pertaining to the elections of legislators. The constituents of a candidate for legislative office "have a perfect right to expect the legislative candidate to make certain promises of performance in office, and, upon election, to abide by those promises." Charles J. Kahn, Jr., *Judicial Elections: Canon 7, Politics, and Free Speech*, 72 Fla. B. J. 22, 30 (July/August 1998). By contrast, "citizens as potential litigants are not entitled to an expectation that a judge will rule in accordance with philosophical predilection as opposed to the law and facts of a given case." *Id.*

Canon 7C(1) was thus designed to balance two fundamental constitutional rights: the right of a judicial candidate to free speech; and the right of litigants to due process, which would be threatened by corruptly influenced judges (a fate Florida knows all too well) or by the loss of public confidence in the integrity and impartiality of the judiciary. Canon 7C(1) effectively serves the latter interest while placing a minimal burden on the former. *Id.* ("This

clash of constitutional values, not inherent in nonjudicial elections, requires a policy choice. Florida, in keeping with its commitment to an independent judiciary, has made such a policy choice through the restrictions imposed by Canon 7").

CONCLUSION

Amici Curiae request that this Court affirm the decision of the Florida Supreme Court, and hold that Canon 7C(1) of the Florida Code of Judicial Conduct is constitutional because it promotes the State's compelling interest in preserving the integrity of the judiciary and maintaining the public's confidence in a impartial judiciary, and that it is narrowly tailored to effectuate those interests.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICI CURIAE* THOMAS R. PHILLIPS WALLACE B. JEFFERSON PERRY O. HOOPER, SR. AND SUE BELL COBB IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

We *amici curiae* are former Chief Justices of the Supreme Courts of Texas and Alabama—States that hold partisan contested judicial elections and do *not* prohibit candidates from directly soliciting campaign contributions. Collectively, we have decades of experience on the bench, having participated in more than two dozen elections—including contested races in which both we and our opponents engaged in personal solicitation for campaign contributions.[1]

Petitioner claims that "[t]he experience in other States that choose judges through election provides strong evidence that contribution solicitation bans like Canon 7C(1) do not meaningfully advance the State's interest in judicial impartiality." Pet. Br. 26. Based on our substantial experience with personal solicitation by judicial candidates—in our own campaigns and those of others—we disagree with Petitioner's view that such bans do not advance both the appearance and the reality of judicial impartiality. During our respective tenures as Chief Justice we tolerated direct solicitation in our States, not because of its inherent virtue, but because the practice is engrained in our political and legal cultures. Our States have always been outliers in this regard. The great majority of States with elected judiciaries banned this practice years ago, and this prohibition has been

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1. Pursuant to S. Ct. R. 37.3(a), *amici* have filed with the Clerk the parties' written consent to the filing of this brief. Pursuant to S. Ct. R. 37.6, *amici* state that no party or counsel for a party authored this brief in whole or in part, and no person or entity other than amici or its counsel made a monetary contribution to the preparation or submission of this brief. The Appendix to this brief provides biographies for each *amicus curiae*.

embraced by our colleagues in those States as having many salutary benefits.

SUMMARY OF ARGUMENT

This Court has long recognized that States are laboratories of experimentation. States perform this role by "devis[ing] various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). That is precisely what has occurred here: most States have chosen to prohibit personal solicitation by judicial candidates; other States (including ours) have not. *Cf. Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1630-31 (2014) (discussing States' divergent approaches to race-conscious admissions policies).

As former Chief Justices who have observed countless elections in our own States, and run as candidates for judicial office, we are well-acquainted with the genuine dangers—and sometimes actual abuse—present when judicial candidates personally solicit campaign contributions from parties and lawyers. We believe, however, that States should be permitted to choose for themselves whether to allow judicial candidates to personally solicit campaign funds. In our States, where judicial races have, from time to time, escalated into expensive and highly salient contests involving the clash of judicial ideologies and philosophies, the notion of a Marquess of Queensberry regime where candidates sit back without seeking donations seems almost quaint to the point of absurdity. But for States that have long regarded judicial elections as distinct in both purpose and appearance from campaigns for representative political

office, a rule like Florida's can play an important, perhaps crucial, role in maintaining independent, respected courts.

In urging this Court to sustain Canon 7C(1) of the Florida Code of Judicial Conduct ("Florida's Rule"), we emphasize its narrow scope. Florida's Rule in no way compromises a voter's ability to ask, or a candidate's ability to speak, about issues or views. *Compare Republican Party of Minn. v. White*, 536 U.S. 765 (2002). The only speech that is curtailed in any way is the candidate's request for contributions.

We also urge the Court to consider the context in which Florida's Rule arises and operates. This is a judicially-created measure, governing the conduct of lawyers (who are already subject to regulation by the State) during judicial elections. Florida's Rule is also inextricably linked with the regime of self-regulation by the State's judiciary—and therefore with the independence of its judiciary. Considered in this context, we believe Florida's Rule is not appropriately reviewed using "strict scrutiny." And under any more deferential standard of review, Florida's Rule advances sufficiently important interests, and is tailored to serve those interests, such that Petitioner's First Amendment challenge should be rejected.

ARGUMENT

I. FLORIDA'S RULE SHOULD NOT BE REVIEWED UNDER STRICT SCRUTINY

A. Florida's Personal Solicitation Rule Is Narrow and Does Not Impede "Core" First Amendment Speech

Florida's Rule disallows a lawyer, who is running for judicial office, from personally asking for a donation to his or her campaign—and nothing more.[2] Significantly, the Rule does not:

- Prevent a candidate from speaking freely about issues and ideas. *Compare White*, 536 U.S. 765; *Brown v. Hartlage*, 456 U.S. 45 (1982).

- Prevent a candidate from conveying "informative" or "persuasive speech" with the purpose or effect of eliciting support for the candidate or a cause. *Compare Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

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2. We express no view here about whether the Florida Supreme Court went too far by viewing a mass mailing unaccompanied by one-on-one communication as a "personal solicitation." *See The Fla. Bar v. Williams-Yulee*, 138 So. 3d 379, 382 (Fla. 2014). We are unaware of any definition of "personal solicitation" adopted for purposes of interpreting and applying Florida's Rule, and the Florida Supreme Court did not address the meaning of the term beyond determining the conduct at issue here fell within the ambit of its prohibition. While these kinds of mass solicitations can result in abuse, the most pernicious problems come when there is private oral or written solicitation by a candidate to a specific potential donor.

- Prevent a candidate's campaign from raising as much money as otherwise permitted by law. *Compare Arizona Free Enter. Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011).

- Prevent a candidate from spending as much money as otherwise permitted by law. *Compare Randall v. Sorrell*, 548 U.S. 230 (2006);

- Prevent donors from making contributions to as many campaigns as otherwise permitted by law. *Compare McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

- Prevent donors from independently spending unlimited sums to discuss issues, or to support or oppose candidates. *Compare Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

- Prevent anyone from endorsing a candidate, or discussing a candidate's qualifications for office. *Compare Eu v. San Fran. Cnty. Democratic Cent. Comm.*, 489 U.S. 214 (1989).

- Prevent anyone from distributing campaign literature—anonymously or otherwise. *Compare McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

As Petitioner acknowledges, the Rule "does not regulate *who* may contribute or *how much* they may contribute." Pet. Br. 12 (emphasis in original). In fact, the Rule does not limit or regulate *any aspect* of what a potential campaign contributor may say or do. Nor has

Petitioner suggested that a potential campaign contributor has a fundamental right to be personally asked to contribute funds to the campaign of a judicial candidate.

When Florida's Rule is examined with precision, it becomes clear that—contrary to Petitioner's contention—the Rule does not proscribe what the Court has previously identified as "core" First Amendment-protected speech."[3] *Compare* Pet. Br. 2, 8, 10, 11 *with Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (statements about a candidate's voting record); *Citizens United*, 558 U.S. at 393 (Scalia, J., concurring) (documentary film critical of a presidential candidate); *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 477-78 (2007) (advertisements that mention candidates during the run-up to an election); *Virginia v. Black*, 538 U.S. 343, 365 (2003) (cross burning to make a statement and not to intimidate); *McIntyre*, 514 U.S. 334, 346 (distributing anonymous leaflets that oppose a tax levy); *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (circulating a petition for signatures); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) (independent expenditures to advocate for issues).

That this case concerns activity during an election does not itself transform Florida's Rule into one constraining "core" First Amendment-protected speech. As noted above, the Rule does no more than prevent a judicial candidate from personally communicating to a potential donor a request: "give me money for my campaign." *See* Randolph Wolfson, et al., Amici Curiae Br. 4 (acknowledging the conduct at issue is "[s]imply asking

3. Petitioner's First Amendment challenge is based solely on the Amendment's speech provision, and we have limited our discussion accordingly.

for funds"). The absence of that limited form of expression does not diminish the marketplace of ideas that the First Amendment was enacted to create and protect. *See New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference."). In that regard, this case stands in stark contrast to *White*, where the law at issue prevented candidates from speaking about *issues* and *ideas* during an election. *See White*, 536 U.S. at 768.

While we do not minimize the importance to a candidate participating in a high salience campaign of amassing the largest possible war chest to disseminate one's message as widely as possible, a prohibition on direct solicitation will hardly result in an uninformed electorate. Candidates in Florida and most other States with elected judges can still raise money through committees; candidates can spread their message through websites and social media at minimal cost; political parties, civic groups and media outlets can support candidates; bar associations and voter education groups can inform the public about candidate qualifications and positions; and independent spenders can spread messages in an attempt to persuade voters. Indeed, while Alabama and Texas have traditionally been national leaders in judicial campaign expenditures,[4] the most expensive high court

4. Texas's most expensive Supreme Court races came in the late 1980s and early 1990s, when the two major political parties were of roughly equal strength among voters. From 2000 to 2009, Alabama was first and Texas fourth among all the States in campaign fundraising and expenditures for high court races. James Sample, et al., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009, at 12 (2010).

judicial races in recent years have occurred in States with a personal solicitation ban.[5] Thus, the narrow constraints on judicial candidate expression implicated here "though not trivial—are not severe." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (rejecting First Amendment challenge notwithstanding that laws "limit, slightly, the party's ability to send a message to voters").

B. Strict Scrutiny Does Not Apply

Petitioner contends this Court should review Florida's Rule under "strict scrutiny." *See* Pet. Br. 8, 11. We disagree. As explained above, the Rule does not prohibit or impede core First Amendment speech. Moreover, Petitioner fails to account for important aspects of the context in which Florida's Rule operates—in connection with election of a judge, not a representative political official; as part of the Florida Supreme Court's regulation of lawyers who practice in the State and agree to abide by its rules of conduct; and in aid of judicial independence. When the context of the Rule is fully taken into account, we believe strict scrutiny is unwarranted.[6]

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5. In 2011-12, the most expensive high court races were in Michigan, Wisconsin and Florida. Alabama was fifth and Texas eighth out of 23 states surveyed. Alicia Bannon, et al., THE NEW POLITICS OF JUDICIAL ELECTIONS 2011-12, at 6 (2013). In 2009-10, the most expensive high court races were in Michigan, Pennsylvania and Ohio; Alabama was fourth and Texas sixth out of 10 states surveyed. Adam Skaggs, et al., THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10, at 5 (2011).

6. The Court has rejected the categorical notion that any limitation or prohibition on the solicitation of money must be reviewed using strict scrutiny. *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 138-39 (2003).

1. Judicial Elections Differ from Elections for Political Office

This Court has recognized in numerous contexts that judges and political actors serve different functions in our system of government. *See, e.g.*, *White*, 536 U.S. at 797 (Stevens, J., dissenting) ("Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials."); *id.* at 803 (Ginsburg, J., dissenting) ("judges perform a function fundamentally different from that of the people's elected representatives"); *Chisom v. Roemer*, 501 U.S. 380, 410-11 (1991) (Scalia, J., dissenting) ("[I]t is the prosecutor who represents 'the People'; the judge represents the Law—which often requires him to rule against the People."); *Bridges v. California*, 314 U.S. 252, 271 (1941) ("Legal trials are not like elections."); *see also* The Federalist No. 78 (Alexander Hamilton) ("For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments[.]").

Because judges and political actors occupy different roles, the processes for electing them should be evaluated under standards that reflect those distinctions. *See Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (Kennedy, J., concurring) ("The differences between the role of political bodies in formulating and enforcing public policy . . . and the role of courts in adjudicating individual disputes according to law . . . may call for a different understanding . . . of the legitimate

restrictions that may be placed upon them."); *see also White*, 536 U.S. at 783 ("[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.").

Petitioner ignores the distinction between judicial elections and elections for political office when contending that Florida's Rule "must satisfy strict scrutiny." Pet. Br. 11, 12. That distinction is important here because the Florida Rule preserves the First Amendment's guarantee of robust debate in campaigns for elected office, *see White*, 536 U.S. at 782, while simultaneously safeguarding the judiciary's role as the apolitical arbiter of individual disputes to be resolved based solely on the law and the facts, *see Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) ("These codes of conduct serve to maintain the integrity of the judiciary and the rule of law.").

2. Rules Governing Judicial Elections Should Be Evaluated in the Context of State Regulation of Lawyers and Other Licensed Professionals

In urging the Court to apply strict scrutiny, Petitioner also overlooks that all persons governed by Florida's Rule have voluntarily subjected themselves to regulation by the State—and agreed to abide by the Rule in question. *See* Fla. Bar Admission R. 3-14.1(f) (requiring bar applicants to submit an affidavit attesting that the applicant has read the Rules of Professional Conduct); Fla. Stat. § 105.031 (requiring candidate for judicial office to file a document "stating that the candidate has read and understands the requirements of the Florida Code of Judicial Conduct"); *see also* Tr. of Apr. 3, 2012 Guilt Phase Hr'g at 19

(Petitioner testifying that she had read and understood the requirements of the Florida Rule when she registered as a candidate for judicial office). The First Amendment does not preclude States from regulating the conduct of licensed professionals operating within its borders. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) ("We have given consistent recognition to the State's interests in maintaining standards of ethical conduct in the licensed professions.").

The Court has accordingly recognized on numerous occasions that the First Amendment permits substantial regulation of lawyer conduct. *See, e.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 635 (1995) ("the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States"); *Edenfield*, 507 U.S. at 774-77 (explaining rationale for sustaining personal solicitation ban on lawyers but not certified public accountants); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (State's interest in regulating lawyers is "particularly strong").

3. Judicially-Promulgated Rules Governing Judicial Elections Should Be Evaluated Mindful of the Role of Self-Regulation in Promoting and Preserving Judicial Independence

There is a "long-standing Anglo-American tradition of an independent judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 217-18 (1980); *see*

also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) ("the independence of the Judiciary [must] be jealously guarded"). This important tradition of independence applies to the States, as well as the federal judiciary. *See Alaska Dep't of Envtl. Conservation v. Environmental Prot. Agency*, 540 U.S. 461, 512 (2004) (Kennedy, J., concurring) (discussing "the judicial independence guaranteed [to States] by their own constitutions").

The Florida Rule was enacted by the State's Supreme Court, pursuant to express authority in the State's Constitution. *See* Fla. Const. art. V, § 15 ("[T]he supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."); *In re Code of Judicial Conduct*, 643 So. 2d 1037 (Fla. 1994) (adopting Florida Code of Judicial Conduct). As such, the Rule is part of a framework for self-regulation by the State's judiciary, which is a critical facet of judicial independence. *See 5-H Corp. v. Padovano*, 708 So. 2d 244, 247 n.8 (Fla. 1997) (quoting Florida Rules of Professional Conduct: "Self-regulation helps maintain the legal profession's independence from undue government domination . . . . Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility."); *see also* Scott E. Gant, *Self-Regulation and an Independent Judiciary*, THE POLITICS OF JUDICIAL INDEPENDENCE 213, 224 (2010) ("judicial self-regulation . . . should be viewed as promoting . . . judicial independence"); Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 Yale L. & Pol'y Rev. 33, 72 (2012) ("Congress may withdraw the judiciary's power

to self-regulate, fundamentally undermining judicial independence").

If foundations of judicial self-regulation, like the personal solicitation prohibition, are dismantled, the State's political branches may respond to real or perceived problems with the judiciary by imposing rules of conduct on judges and judicial candidates. *See* William Howard Taft, *Address of the President*, 37 Annual Report of the Am. Bar Assoc. 359, 384-85 (1914) ("The agitation with reference to the courts, the general attacks upon them, the grotesque remedies proposed of recall of judges and recall of judicial decisions, and the resort of demagogues to the unpopularity of courts as a means of promoting their own political fortunes, all impose upon us, members of the Bar and upon judges of the courts and legislatures, the duty to remove, as far as possible, grounds for just criticism of our judicial system."). This would compound threats to judicial independence already present when judges are elected or subject to recall by popular vote. *See Swain v. Pressley*, 430 U.S. 372, 382 (1977) (discussing "the critical importance of life tenure" and "[t]he relationship between life tenure and judicial independence").

II. FLORIDA'S RULE ADVANCES IMPORTANT STATE INTERESTS, DIRECTLY ADDRESSES GENUINE CONCERNS, AND DOES NOT VIOLATE THE FIRST AMENDMENT

"The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges." *Lopez Torres*, 552 U.S. at 212 (Kennedy, J., concurring). Florida's Rule: promotes

and preserves the reality and public perception of judicial integrity; promotes and preserves judicial independence; and is a product of the judiciary's effort to regulate the conduct of lawyers licensed to practice in the State. These are interests the Court has long recognized as important. *See, e.g., White*, 536 U.S. at 793 (Kennedy, J., concurring) ("Judicial integrity is . . . a state interest of the highest order."); *Caperton*, 556 U.S. at 889 (Judicial codes of conduct serve "a vital state interest" by safeguarding against judicial campaign abuses); *Went for It, Inc.*, 515 U.S. at 625 (noting State's compelling interest in the practice of professions within their boundaries).

The Rule furthers these interests, in part, by helping avoid actual and perceived *quid pro quo* corruption—which the Court has acknowledged is a vital interest unto itself. *See, e.g., Arizona Free Enter. Club's Freedom PAC*, 131 S. Ct. at 2841 ("Our campaign finance precedents leave no doubt: Preventing corruption or the appearance of corruption is a compelling government interest.").

Petitioner mistakenly points to experience in States like ours—where there is no personal solicitation ban—as substantiating its claim that the Rule "does not meaningfully advance the State's interest in judicial impartiality." Pet. Br. 26. Instead, our experience confirms there is a real risk that solicitation can morph into a demand.

Consider a few instances of personal solicitation by sitting appellate judges from one of our States:

> A judge directly emailed a small group of partners at a prominent firm within the State, detailed the contributions made by other firms ("all the Top 10 firms are committed to maxing out as a firm: $30,000 total"), and requested that their firm "do the same," explaining that "[a]t most of the firms, they are designating a senior partner . . . to bundle dozens of relatively small-$ contributions . . . until they reach the target," and promising "Bottomless thanks!"
>
> A judge, soon after being elected, sent a personal email to a local lawyer that stated in part: "I trust that you will see your way clear to contribute to my campaign account in an amount reflective of the $2,000 contribution you made towards my defeat . . . and the fact that by their very nature post-election contributions are tardy and in very few realms does tardiness not incur an up-charge."
>
> A judge sent personally addressed letters to selected local attorneys which said in part: "Liberal . . . special interest groups . . . have targeted [my] court . . . for a Democrat take-over. Tort reforms . . . are at risk if we lose this court. . . . I have already reached the maximum allowable PAC contributions, and now can only accept personal or law firm contributions. I need your help. Please let me hear from you today."

While we do not believe that any of these judges felt they were exerting inappropriate influence on their addressees, at least some of those who were solicited no doubt felt pressured, or worse. Each of us has likely come close to a line that we criticize in this *amicus* brief—passionately urging financial support. This is a nasty byproduct of a deeply flawed system, which will be made worse nationally if Florida's Rule is struck down.

Direct solicitations made over the telephone or in face-to-face meetings are particularly problematic because they put members of the bar to an untenable choice: contribute to the candidate's campaign or refuse to do so and risk the consequences. It would be natural for the attorney on the receiving end of the solicitation to think that it could help clients to make a contribution—or hurt them by refusing to do so. An exchange similar to the following fictional account is not uncommon in our States:

> *Chief Justice*: Hello, Mr. Smith, this is Chief Justice Jefferson. I am calling because I am on the ballot this year, and I could really use your help.
>
> *Mr. Smith*: Well I did not intend to get involved in judicial elections this year, but you are doing a fantastic job as chief justice.
>
> *Chief Justice*: No one likes the politics in these elections, but we are compelled to engage. Now, you have appeared in my court many times. You would agree, I hope, that I am always prepared for oral argument?

Mr. Smith: Certainly.

Chief Justice: Mr. Smith, may I count on your financial support so that I may continue to serve the people of Texas?

Mr. Smith: Of course, Mr. Chief Justice. I will take care of that right away.

Chief Justice: Thank you, Mr. Smith.

See Wallace B. Jefferson, *Reform from Within: Positive Solutions for Elected Judiciaries*, 33 Seattle U. L. Rev. 625, 625 (2010); *see also* Roy A. Schotland, *Six Flaws: A Comment on Bopp and Neeley*, 86 Denv. U. L. Rev. 233 (2008) (discussing similar scenarios). In cases like this, where the attorney would not have donated money to the campaign but for the personal request from the judicial candidate, the resulting contribution might be viewed as a form of compelled speech. *Cf. McCutcheon*, 134 S. Ct. at 1448 (explaining that a campaign contribution is an expression of support for the candidate).

Personal solicitation gives rise to risks not present when funds are raised through campaign officials—even if a judicial candidate can learn through disclosure filings who donated and in what amount. For instance, written disclosures do not reveal *what was said* during a personal solicitation. And communications carried out privately, without witnesses, are more likely to lead to perceived and real corruption. *Cf. Lowe v. Securities and Exh. Comm'n*, 472 U.S. 181, 210 (1985) ("The dangers of fraud, deception, or overreaching that motivated the enactment of the [Investment Advisors Act] are present

in personalized communications but are not replicated in publications that are advertised and sold in an open market."). This reality underlies the firmly-entrenched principle discouraging judges from engaging in ex parte communications. *See* Code of Conduct for U.S. Judges, Canon 3(A)(4) (prohibiting ex parte communications); Am. Bar. Assoc. Model Code of Judicial Conduct, Canon 2.9 (same); *see also* Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 Hous. L. Rev. 1343 (2000). It also underlies this Court's recognition that the dynamics of personal solicitation may differ from less direct forms of solicitation. *See Ohralik*, 436 U.S. at 457, 462 (holding State can categorically ban in-person solicitation by lawyers consistent with the First Amendment, and observing "in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection," and "legitimate and important state interest" is served by protecting the public from aspects of in-person lawyer solicitation, including "fraud, undue influence, intimidation, overreaching."); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988) ("In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference."); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 705 (1992) ("We have in the past recognized that in-person solicitation has been associated with coercive or fraudulent conduct.").

When the plea by a judicial candidate comes from a sitting judge (or a challenger likely to prevail), it is hard to refuse. If Petitioner were correct that it makes no difference whether a solicitation is made personally by a judicial candidate or by a committee (Pet. Br. 19),

then few sitting judges would bother spending much time fundraising. But we know the opposite is true: candidates in contested races spend significant personal time and energy soliciting funds. A lawyer who appears regularly before a court will seldom disregard the judge's urgent request for a contribution to the judge's campaign. And the very idea that a personal solicitation is bound to yield substantial campaign rewards reinforces the value in a State's regulation of these transactions.

When contributions are solicited and received by a candidate's committee, it is much easier to either disregard the request or say "no." And when a contribution is made through a committee, there is a "chain of attribution" which reduces "opportunities for abuse." *McCutcheon*, 134 S. Ct. at 145. We therefore disagree with Petitioner's assertion that the separation between candidates and donors achieved by Florida's Rule is an "illusion." Pet. Br. 2.

We also view with skepticism the suggestion of limiting the personal solicitation prohibition to donors with pending cases. *See* ACLU Amici Curiae Br. 5, 16-17; *see also* Randolph Wolfson, et. al., Amici Curiae Br. 25. In many jurisdictions the same lawyers (and even the same litigants) repeatedly appear before the court. In those circumstances, the absence of a case before a given judge at a given moment would be happenstance rather than an effective compromise measure. Moreover, such a rule would create an uneven playing field among lawyers and litigants in the jurisdiction because they would have to operate under different rules depending on the contingency of whether they had a case pending at the time of the solicitation.

We are similarly skeptical about the suggestion that heavy reliance on recusal is effective in eliminating real or perceived corruption arising from personal solicitation. *See* Pet. Br. 2, 23-24. In addition to the obvious point that most recusal decisions are a matter of discretion residing with the judge in question, recusal is of limited practical utility when the conduct potentially giving rise to it is private, and carried out without third-party witnesses, as with many instances of personal solicitation.

CONCLUSION

We served as judges in States which chose not to prohibit personal solicitation of campaign contributions by judicial candidates. As Chief Justices we decided not to alter that choice, believing our system was best suited to the needs and cultures of our own States—even if it made our judicial election systems more susceptible to real and perceived corruption.

Florida, and numerous other States, have made a "realistic appraisal of psychological tendencies and human weakness," *Caperton*, 556 U.S. at 883, and opted for a different path, dispensing with personal solicitation by judicial candidates.

The selection of judges through elections is controversial. *See Citizens United*, 558 U.S. at 460 (Stevens, J., concurring in part and dissenting in part) ("concerns about the conduct of judicial elections have reached a fever pitch"). But most States adhere to their "longstanding practice and tradition" of choosing judges through a vote of the People. *Lopez Torres*, 552 U.S. at 212 (Kennedy, J., concurring). We urge the Court to preserve

the ability of each State, as part of its own practice and tradition, to choose for itself whether to permit judicial candidates to personally solicit campaign funds. We therefore submit that the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — *AMICI CURIAE* BIOGRAPHIES

Thomas R. Phillips was appointed Chief Justice of the Texas Supreme Court by Governor Bill Clements in 1988. Later that year, he won a general election to retain his seat, becoming the first Republican to be elected Chief Justice in Texas history. Former Chief Justice Phillips went on to win three more general elections to retain his seat, before resigning in 2004 to return to private legal practice. His seventeen-year career as Chief Justice is the third longest in Texas history. A graduate of Baylor University and Harvard Law School, Former Chief Justice Phillips served as President of the Conference of Chief Justices from 1997 to 1998.

Wallace B. Jefferson was appointed Chief Justice of the Texas Supreme Court by Governor Rick Perry in 2004, after Former Chief Justice Phillips resigned. Later that year Former Chief Justice Jefferson won the first of two general elections to retain that seat. He is the first African American to serve on the Texas Supreme Court, the first African American to serve as the Chief Justice of the Texas Supreme Court, and one of the first African Americans to be elected to that Court. Former Chief Justice Jefferson resigned from the bench in 2013 to return to private practice. A graduate of Michigan State University and the University of Texas School of Law, Former Chief Justice Jefferson served as President of the Conference of Chief Justices from 2010 to 2011.

Perry O. Hooper, Sr., served in the Marine Corps during World War II and then attended Birmingham Southern College and the University of Alabama School of Law. He began his career in private practice and then won an election to serve as a probate court judge in 1964. Over the next thirty years, Former Chief Justice Hooper would serve in Alabama's courts, re-enter private practice, and run for the United States Senate. In 1994, he was elected as Chief Justice of the Alabama Supreme Court, a seat he held until 2001.

Sue Bell Cobb was elected to the bench shortly after her admission to the Alabama bar, making her one of Alabama's youngest judges. She served as a District Judge in Conecuh County from 1981 until 1994, when she was elected to the Court of Criminal Appeals. In 2006, she unseated the Republican Chief Justice Drayton Nabers, Jr., to become the first woman ever elected as Chief Justice of Alabama's Supreme Court and, at the time, the only Democrat on that Court. She resigned in 2011. Former Chief Justice Cobb is a graduate of the University of Alabama and the University of Alabama School of Law.

AMICUS CURIAE BRIEF

No. 13-1499

IN THE
Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF OF PROFESSORS OF LAW, ECONOMICS, AND POLTICIAL SCIENCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of law, economics, and political science who study the effects of judicial elections on judicial decision-making. *Amici* include scholars recognized for their empirical study of judicial behavior and located at leading research institutions in the United States and Canada. Individual *amici* are specifically identified in the appendix to this brief.

Amici curiae are engaged in interdisciplinary research designed to assess empirically the effects of various electoral systems and behaviors on the independence and impartiality of an elected judiciary. On the basis of their research, *amici* believe that Canon 7(C)(1) of the Florida Code of Judicial Conduct helps to ensure that Florida's judges remain impartial, despite the electoral pressures associated with campaigns for judicial office. Moreover, *amici* believe that Canon 7(C)(1) preserves public confidence in Florida's courts by eliminating a significant source of perceived bias, namely, the personal solicitation of campaign contributions by candidates for judicial office.

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[1]Letters from the parties consenting to this filing accompany this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*'s counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The State of Florida relies on judicial elections to select or retain all members of its judiciary. The nonpartisan and retention elections on which the State relies are designed to ensure that voters maintain some ability to hold the State's judges accountable. However, the State has determined that subjecting judges to all of the rigors associated with campaigning for judicial office is ill-advised. Accordingly, Florida has enacted a canon of judicial conduct that insulates judges from the process of personally soliciting campaign contributions. Canon 7(C)(1) of the Florida Code of Judicial Conduct provides in relevant part that "[a] candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds . . . but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign." Fla. Code of Jud. Conduct, Canon 7(C)(1).

In the proceedings below, the Florida Supreme Court rejected a First Amendment challenge to Canon 7(C)(1), holding that the canon is narrowly tailored to advance the State's compelling interests in preserving the integrity of its judiciary and maintaining public confidence in its court system. *Amici*—professors studying the effect of judicial elections on judicial decision-making—respectfully urge the Court to affirm the Florida Supreme Court, allowing the State to advance its compelling interest in preserving the actual and perceived impartiality of its state courts.

A functioning judiciary must dispense justice independently and impartially. But empirical evidence shows that campaign contributions to candidates for judicial office can be correlated with favorable outcomes in subsequent proceedings before recipient judges. Further study reveals that imminent retention events also affect judicial decision-making and case outcomes. By sheltering candidates for judicial office from the electioneering associated with soliciting campaign contributions, Canon 7(C)(1) addresses a potential source of bias while signaling to the public that the judiciary remains committed to neutral and impassive adjudication. For these reasons, Canon 7(C)(1) advances two compelling interests under the First Amendment, and does so without sacrificing entirely the accountability associated with judicial elections.

ARGUMENT

I. Canon 7(C)(1) Advances The State's Compelling Interest In Maintaining The Impartiality Of Its Courts.

"The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2007) (Kennedy, J., concurring). However, it can be "difficult to reconcile" the need for an independent and unbiased judiciary with required elections for judicial office. *Id.* at 212-13; *see also Republican Party of Minn. v. White*, 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting) ("This Court has recognized in the past . . . a fundamental

tension between the ideal character of the judicial office and the real world of electoral politics." (internal quotation marks omitted)). Indeed, increasingly expensive and contentious campaigns for judicial office pose a verifiable threat to the independence and impartiality of courts. Research shows that campaign contributions to elected judges can be correlated with favorable decisions in subsequent cases. Moreover, research confirms that imminent retention elections affect judicial behavior in several contexts, including criminal sentencing and death penalty appeals.

In order to preserve the independence of its courts, without surrendering entirely the accountability associated with electoral competition for judicial office, the State of Florida has prohibited candidates for judicial office from personally soliciting any campaign contributions. As the Florida Supreme Court held, this canon of judicial conduct advances the State's compelling interest in "preserving the integrity of [its] judiciary." Pet. App. at 15a. This Court should affirm the decision of the Florida Supreme Court and hold that regulations designed to protect the integrity of the judiciary advance a compelling state interest. *See, e.g.*, *White*, 536 U.S. at 793 (Kennedy, J., concurring) ("The power and the prerogative of a court to perform [its] function rest, in the end, upon the respect accorded to its judgments. . . . Judicial integrity is, in consequence, a state interest of the highest order.").

A. Empirical Evidence Suggests That Campaign Contributions To Candidates For Judicial Office Can Affect Judicial Decision-Making And Case Outcomes.

Nationwide, nearly 90 percent of state trial and appellate court judges must stand for election or retention.[2] The pressure to solicit campaign contributions in these elections has risen steadily in recent years because judicial elections have been contested with increasing frequency and success. Competitive and costly judicial elections now force candidates for judicial office to solicit campaign contributions in significant volume and amount.

Between 1990 and 2000, the rate at which partisan elections for judicial office were contested rose from 68 percent to 95 percent.[3] During the same period, the rate at which nonpartisan elections for judicial office were contested rose from 44 percent to 75 percent.[4] The increasing frequency with which elections for judicial office are contested has greatly diminished the value of incumbency. In 1980, only 26 percent of

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[2] Joanna Shepherd, *Justice At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, American Constitution Society for Law and Policy 2 (June 2013). Retention contests require that judges seeking reelection run unopposed. Typically, judges retain their position if they receive approval from a simple majority of voters. *Id.* at 4.

[3] Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. Rev. 69, 81 (2011).

[4] *Id.*

incumbent judges were defeated in partisan elections to retain their office.[5] By 2000, the loss rate for incumbent judges seeking retention through partisan elections rose to nearly 46 percent.[6] That loss rate far exceeded the loss rates for incumbent members of the U.S. House of Representatives, the U.S. Senate, and state legislatures.[7]

More competitive judicial elections means more money in judicial elections because the judicial candidate with the largest campaign war chest typically wins. Leading fundraisers prevailed in approximately 75 percent of contested state supreme court races in 1997 and 1998, and in 80 percent of contested races in 2001 and 2002.[8] And candidates are spending more to win. Average candidate expenditures in partisan and nonpartisan elections for state supreme courts more than doubled between 1990 and 2004. In such races, the average candidate spent $364,348 in 1990, but nearly $900,000 in 2004.[9] Given that fundraising is increasingly

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[5] Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L.J. 623, 640 (2009).

[6] *Id.* During the same period, the loss rate for incumbent judges facing nonpartisan elections doubled. Kang & Shepherd, *supra* note 3, at 82.

[7] Between 1990 and 2000, reelection rates for incumbents in the U.S. House of Representatives, U.S. Senate, and state legislatures were 94.1 percent, 89.3 percent, and 85.1 percent, respectively. Shepherd, *supra* note 5, at 647.

[8] Kang & Shepherd, *supra* note 3, at 82.

[9] Shepherd, *supra* note 5, at 640-41.

predictive of success, judges are facing enormous pressure to solicit campaign contributions. Between 1990 and 1999, candidates for judicial office raised approximately $83.3 million. In the subsequent ten year period, ending in 2009, candidates raised $206.9 million.[10]

Like judges nationwide, Florida judges have felt the effects of increased electoral competition. In a 2001 poll, 68 percent of Florida judges responded that "they were under pressure to raise money for their campaigns during election years."[11] And the rigors associated with campaigning for judicial office in Florida are not limited to the State's local and circuit court judges, who compete in nonpartisan elections. Electoral pressure on Florida judges who run in unopposed retention elections every six years—namely, judges on the State's Supreme Court and on its District Courts of Appeal—has also increased. Accordingly, the three Florida State Supreme Court justices facing retention elections in 2014 together raised approximately $1.5 million for their campaigns.[12]

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[10] Shepherd, *supra* note 2, at 1.

[11] American Judicature Society, *History of Reform Efforts: Florida*, http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state=FL (last visited Dec. 17, 2014).

[12] American Judicature Society, *Judicial Campaigns and Elections: Florida*, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state=FL (last visited Dec. 17, 2014).

In comparison, the State's Supreme Court justices raised just $7,500 between 2000 and 2010.[13]

In addition to facing greater competition for votes, candidates for judicial office also must contend with the dramatic growth of independent expenditures made to affect judicial elections. In the 2003-2004 election cycle, interest groups spent a then-record $9.8 million on independent expenditures to elect or oppose candidates for judicial office.[14] By the 2011-2012 election cycle, independent expenditures in judicial elections rose more than 50 percent, to $15.4 million.[15]

The dramatic expansion of campaign spending in judicial elections has been driven by particular groups, most notably, groups associated with business interests and attorneys. Between 2000 and 2009, business groups accounted for approximately 30 percent of all contributions to candidates for judicial office.[16] During the same period, lawyers and lobbyists accounted for approximately 28 percent of total contributions.[17]

That business interests, lawyers, and lobbyists together account for nearly 60 percent of campaign contributions to candidates for judicial office is

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[13] Alicia Bannon, et al., *The New Politics of Judicial Elections 2011-12* 11 (Laurie Kinney & Peter Hardin eds., 2013), *available at* http://newpoliticsreport.org/.

[14] *Id.* at 3-4.

[15] *Id.*

[16] Shepherd, *supra* note 2, at 1.

[17] *Id.* at 3.

problematic because of the fear that campaign contributions affect judicial decision-making. *See White*, 536 U.S. at 790 (O'Connor, J., concurring) ("[C]ampaign donations may leave judges feeling indebted to certain parties or interest groups."). This is not to say that all judges are affected, or that any judge is knowingly affected. After all, "[m]any [elected judges], despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity." *Id.* at 796 (Kennedy, J., concurring). But the research shows that the electoral pressures associated with campaigning for judicial office are putting at risk the independence and integrity of the elected judiciary.

Indeed, studies have shown that campaign contributions from business interests, lawyers, and lobbyists can be correlated with favorable decisions in cases before recipient judges. For example, a comprehensive national study of 175,000 campaign contribution records and 2,345 state supreme court opinions—each related to business interests and published between 2010 and 2012—concluded that elected state supreme court justices receiving at least 25 percent of their campaign contributions from business interests voted in favor of business interests in just over 62 percent of cases, whereas elected state supreme court justices receiving no more than 1 percent of their campaign contributions from the business sector voted in favor of business interests in

only 46 percent of cases.[18] Because approximately one-third of cases before state supreme courts involve business litigants, there is much at stake.[19]

Other studies corroborate the connection between campaign contributions and judicial decision-making. One nationwide study of 21,000 state supreme court decisions published between 1995 and 1998 found that campaign contributions from business groups, labor groups, medical groups, and attorney groups were associated with favorable votes in relevant cases before partisan-elected recipient judges.[20] Studies have also identified a relationship between campaign contributions and voting patterns in labor[21] and arbitration[22] cases. Finally, several researchers have verified empirically that campaign contributions from pro-plaintiff donors can affect judicial behavior.[23]

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[18] Shepherd, *supra* note 2, at 1, 13. State supreme court justices elected in partisan elections receive an average of 25.1 percent of their campaign contributions from business-interests, while state supreme court justices elected in nonpartisan elections receive an average of 16.9 percent of their campaign contributions from business interests. *Id.* at 10.

[19] *Id.* at 9.

[20] Shepherd, *supra* note 5, at 652, 669.

[21] Kang & Shepherd, *supra* note 3, at 113-14.

[22] *See* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & Pol. 645, 684 (1999).

Indeed, one study found that when justices on the Ohio, Kentucky, and Alabama Supreme Courts received a higher amount of campaign contributions from pro-plaintiff donors, those judges were 5.2 times more likely to find for tort claimants than were justices with a smaller amount of contributions from pro-plaintiff sources.[24]

Of course, empirical evidence that the source and amount of campaign contributions can be correlated with subsequent decisions in relevant cases does not establish causality. The source and amount of campaign contributions may affect judicial decision-making directly or, instead, may affect judicial decision-making by selecting for judges with sympathetic dispositions. However, there is certainly evidence that donors *intend* to influence judges directly, as by making significant contributions to candidates for judicial office who are running unopposed,[25] or by making contributions to judges who are not likely to share the contributors' view of the law.[26] In fact, empirical analysis demonstrates that contributions to judges who are not likely to share the contributor's

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[23] *See, e.g.*, Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994-1997*, 31 Pol. & Pol'y 314, 330 (2003).

[24] *See* Eric N. Waltenburg & Charles S. Lopeman, *Tort Decisions and Campaign Dollars*, 28 Southeastern Pol'y Rev. 241, 255 (2000).

[25] *Id.* at 246.

[26] Shepherd, *supra* note 2, at 14.

view of the law have a much stronger association with subsequent voting patterns than do contributions to more like-minded judges.[27] Empirical analysis also shows that the correlation between campaign contributions and voting patterns tends to disappear when judges face mandatory retirement.[28] These findings suggest that the effect of campaign contributions on judicial decision-making cannot be attributed entirely to donor support for candidates with sympathetic judicial ideologies. Thus, it appears that donors not only intend to influence judges, but may also experience success in doing so.[29]

Judges agree that campaign contributors often intend to buy influence. In a nationwide survey of 2,428 judges, more than 80 percent responded that campaign contributions are intended "to use the courts to shape

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[27] *Id.* (business-related contributions more strongly correlated with favorable votes when justice is ordinarily less likely to receive campaign contributions from business groups, and less likely to render decisions favorable to business groups).

[28] *See, e.g.*, Kang & Shepherd, *supra* note 3, at 104.

[29] *See also* Margaret S. Williams & Corey A. Ditslear, *Bidding for Justice: The Influence of Attorneys' Contributions on State Supreme Courts*, 28 Just. Sys. J. 135, 153 (2007) (finding evidence that campaign contributions affect the voting patterns of some judges but not others); McCall, *supra* note 23, at 328 (finding evidence that judges ordinarily disposed against plaintiffs' claims moderate their decisions when contributions from groups that support plaintiffs' interests exceed contributions from groups that support defendants' interests).

policy."[30] Many judges also agree that campaign contributions can, in fact, influence decisions. In the same nationwide survey, more than 26 percent of judges responded that campaign contributions have "great" influence or "some" influence on their decisions, and more than 45 percent responded that campaign contributions have at least a little influence on their decisions.[31]

Such evidence is troubling because judges, "[u]nlike their counterparts in the political branches, . . . are expected to refrain from catering to particular constituencies." *White*, 536 U.S. at 803-04 (Ginsburg, J., dissenting). Indeed, judges should "decide individual cases and controversies on individual records," not on perceptions of electoral debt. *Id.* at 804 (Ginsburg, J., dissenting) (internal quotation marks omitted). Judicial elections can ensure that judges are accountable for any departure from their sworn duty to decide each

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[30] Greenberg Quinlan Rosner Research Inc., et al., *Justice At Stake-State Judges Frequency Questionnaire*, 9 (2002), *available at* http://www.justiceatstake.org/media/cms/JASJudgesSurvey Results_EA8838C0504A5.pdf. Some judges also have been outspoken about their beliefs that campaign contributors are seeking a quid pro quo. For example, Ohio State Supreme Court Justice Paul Pfeifer has remarked that "[e]veryone interested in contributing [to a candidate for judicial office] has very specific interests. They mean to be buying a vote." Shira J. Goodman, *The Danger Inherent in the Public Perception that Justice is For Sale*, 60 Drake L. Rev. 807, 817 (2012) (quotation marks omitted).

[31] Greenberg Quinlan Rosner Research Inc., et al., *supra* note 30, at 5. In Florida, 30 percent of judges report that campaign contributions have "at least some influence on their decisions." American Judicature Society, *supra* note 11.

case on the facts and the law. However, it is critical that attempts to promote this accountability not interfere with the judiciary's ability to render just decisions, irrespective of how those decisions are viewed by particular voters or interest groups.

In sum, the research suggests, and many judges agree, that the source and amount of campaign contributions to candidates for judicial office can affect judicial decision-making and case outcomes. The State of Florida has enacted Canon 7(C)(1) to disrupt this connection between contributions and decisions, and to help ensure that cases in its courts are decided only on the facts and the law. This purpose, to provide independent and impartial courts, is "a state interest of the highest order," *id.* at 793 (Kennedy, J., concurring), and a compelling interest under the First Amendment.

B. Studies Show That The Pressures Associated With Reelection To Judicial Office Can Affect Judicial Decision-Making And Case Outcomes.

"It is the business of judges to be indifferent to popularity." *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991) (quotation marks omitted). However, candidates for judicial office face significant electoral pressures, including the need to attract and mobilize voters and to navigate interest group politics. The competitiveness and cost of judicial elections have in recent years compounded these pressures.

Studies have shown that the rigors of running for judicial office can affect judicial decision-making across a broad range of cases. A study of death penalty appeals—each of which was heard in one of four state supreme courts over a five-year period—found that

where judges were required to run for reelection, the likelihood that they would affirm imposition of the death penalty greatly increased.[32] The study also found that the effect of running for reelection was magnified by previous experience with electoral politics and by more competitive elections.[33] Anecdotal evidence underscores that electoral pressures can affect how state supreme court justices adjudicate death penalty appeals. Recounting his perception of voter preferences, one Louisiana State Supreme Court justice asserted that "his constituents . . . clearly preferred the death penalty as a punishment for murder and . . . would retaliate against him at election time if [he] did not reflect constituent preferences" in his death penalty decisions.[34]

Researchers have also demonstrated empirically that reelection events can affect judicial decision-making with respect to sentencing and tort claims. One study of 22,000 cases from Pennsylvania trial courts found that the sentences imposed in aggravated assault, rape, and robbery cases were considerably longer when judges were "close[ ] . . . to standing for

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[32] Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. Pol. 427, 436-37, 442 (1992).

[33] *Id.* at 442.

[34] Shepherd, *supra* note 5, at 648 (quotation marks omitted). Similar evidence of "[s]trategic voting" has been found when conservative judges must interpret abortion statutes in states with liberal abortion laws. *See* Melinda Gann Hall, *The Controversy Over Electing Judges and Advocacy in Political Science*, 30 Just. Sys. J. 284, 286 (2009).

reelection."[35] Indeed, that same study found that "[a]ll else equal, the sentence imposed by a judge whose election is imminent is likely to be about three to four-and-one-fourth months longer . . . than if the judge were recently elected or retained."[36] The study further found that even judges ordinarily disposed to impose harsh sentences increased the severity of the sentences they imposed when approaching reelection.[37] And similar trends were apparent in tort cases, where judges typically sympathetic to defendants were 11 percent more likely to find for defendants during "electorally salient years."[38]

The dynamics of reelection can affect judicial decision-making because, in order to secure reelection, judges must account for the political preferences of interest groups and voters. Indeed, evidence indicates that elected judges may adjust their decision-making to ascendant political views, as by moderating their decision-making when control of the political branches shifts from one political party to another.[39] By way of contrast, judges sheltered from electoral pressures because they intend to retire rather than seek

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[35] Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 Am. J. Pol. Sci. 247, 248 (2004).

[36] *Id.* at 255.

[37] *Id.* at 258.

[38] Waltenburg & Lopeman, *supra* note 24, at 242, 250-51.

[39] Shepherd, *supra* note 5, at 629, 665-66.

reelection show no evidence of being influenced by popular opinion.[40]

Although electoral pressures can affect judges who intend imminently to run for reelection, evidence suggests that states can promote impartiality without abandoning their pursuit of judicial accountability. This is so because the effect of electoral pressure on judicial decision-making varies across retention systems: Partisan campaigns for reelection have a more significant impact on judicial behavior than do nonpartisan elections or retention elections. Indeed, one study of 28,000 cases involving 470 state supreme court justices found that, as compared to nonpartisan and retention reelections, partisan reelections are much more likely to yield a correlation between decisions and campaign contributions in labor cases, medical malpractice cases, and products liability cases.[41] Another study—of 7,000 tort cases across 48 states—concluded that partisan elections have the most significant effect on judicial decision-making, finding that the average tort award entered against an out-of-state business was $332,800 larger in states that relied on partisan rather than nonpartisan elections to select judges.[42]

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[40] *Id.* at 663-64.

[41] *Id.* at 661-62.

[42] Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & Econ. 157, 157, 168 (1999). The studies' authors reasoned that elected judges have electoral incentives to redistribute wealth from outside the state to within it. *Id.* at 166.

Research on the relative effects that different election systems have on judicial decision-making indicates that insulation from partisan politics can diminish the impact of reelection events on judicial behavior. Studies suggesting that judges appointed for life are far more independent than judges required to stand for reelection underscore that insulating judges from political competition has a salutary effect. Such studies show that appointed judges are more likely than their elected colleagues to subject administrative agency action to rigorous review,[43] and more likely to identify case-sensitive factors that can determine the outcome of litigation.[44]

It should be true that "judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public." *White*, 536 U.S. at 806 (Ginsburg, J., dissenting); *see also id.* (Ginsburg, J., dissenting) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." (quoting *W. Va. Bd. of Educ. v. Barnette*, 319

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[43] *See generally* F. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 J.L. Econ. & Org. 534 (2000).

[44] *See generally* F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. Legal Stud. 205 (1999) (finding greater volume of litigation in states with appointed rather than elected judiciaries and attributing difference to greater decisional uncertainty associated with appointed, more independent, adjudicators).

U.S. 624, 638 (1943)). But the evidence shows that subjecting judges to electoral politics can affect judicial decision-making and case outcomes. The impact that imminent campaigns for reelection can have on judicial decision-making is most plain with respect to decisions that concern criminal issues, like death penalty appeals and sentencing. But imminent retention events can also affect judicial decision-making on less visible issues, including products liability and medical malpractice cases.

Firmly grounded in empirical evidence that confirms the salutary effect of insulation, Canon 7(C)(1) shelters judges from the influence that personally politicking for campaign contributions might have on their decision-making. In short, Canon 7(C)(1) promotes judicial independence and integrity without sacrificing entirely the accountability associated with judicial elections. This purpose is compelling under the First Amendment.

II. Canon 7(C)(1) Advances Florida's Compelling Interest In Maintaining Public Confidence In The Impartiality Of Its Courts.

Although research suggests that judicial decision-making is affected by campaign contributions to candidates for judicial office, and by the electoral pressure associated with standing for reelection to judicial office, it would be error to assume that any judge is knowingly partial. Many state judges maintain their independence and impartiality despite the rigors associated with campaigning for judicial office, *see White*, 536 U.S. at 796 (Kennedy, J., concurring), and this Court has rightly emphasized that there is a

"presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). But independence and impartiality, however critical to the dispensation of justice, are not sufficient to ensure a functioning judiciary. Rather, a functioning judiciary requires the respect of the litigants that appear in its courts, and the respect of the communities that are affected by its judgments. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009). Absent public confidence in the independence and impartiality of its judges, an elected judiciary lacks the legitimacy required to continue making the hard decisions sometimes compelled by the facts and the law.

Mindful that the judicial function is uniquely dependent on popular perceptions of independence and impartiality, Florida enacted Canon 7(C)(1) in order to insulate candidates for judicial office from the sometimes indecorous process of raising funds for judicial elections. As the Florida Supreme Court held, this purpose advances the State's compelling interest in preserving public confidence in its judiciary. Pet. App. at 15a.

This Court has recognized that preserving public confidence in the independence, impartiality, and integrity of the judiciary is a state interest of the highest order. *Caperton*, 556 U.S. at 889 (quoting *White*, 536 U.S. at 793 (Kennedy, J., concurring)); *see also, e.g., Cox v. Louisiana*, 379 U.S. 559, 565 (1965) ("A State may . . . properly protect the judicial process from being misjudged in the minds of the public."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("[T]o perform its high function in the best way[,] justice must satisfy the

appearance of justice." (internal quotation marks omitted)). In this case, the Court should recognize that the State of Florida's interest in preserving public confidence in its courts is compelling under the First Amendment.

A. The Enduring Impartiality Of The Judiciary Depends On Public Confidence In The Judiciary.

"The power and the prerogative of a court to [resolve disputes] rest[s], in the end, upon the respect accorded to its judgments." *Caperton*, 556 U.S. at 889 (quoting *White*, 536 U.S. at 793 (Kennedy, J., concurring)). Public confidence in the independence and impartiality of the judiciary is critical because judgments made on the facts and the law cannot satisfy all litigants, and will certainly dismay some members of the public. *See, e.g.*, *White*, 536 U.S. at 798 (Stevens, J., dissenting) ("[C]ountless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them.").

There is widespread concern that campaigns for judicial office necessarily erode public confidence in the judiciary. "When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception . . . of judicial independence and judicial excellence." *Lopez Torres*, 552 U.S. at 212 (Kennedy, J., concurring). Research has demonstrated that this concern has merit. Public confidence in the

independence and impartiality of elected judges is diminished substantially when incumbent and aspiring judges must rely on campaign contributions to stand for office.

For this reason, the American Bar Association has recommended, and the State of Florida has adopted, a prophylactic rule requiring that judges "[a]void . . . the [a]ppearance of [i]mpropriety." Fla. Code of Jud. Conduct, Canon 2; ABA Model Code of Jud. Conduct, Canon 2 & Canon 2.4 cmt. The rule promotes public confidence in the judiciary by assuring the public that judges are required to comport themselves with the integrity characteristic of independent and impartial adjudicators. However, the rule also promotes public confidence in the judiciary by ensuring that the State's judiciary "functions independently of the executive and legislative branches." Fla. Code of Jud. Conduct, Canon 2b cmt. The State has recognized that public confidence in its courts is critical to the maintenance of a judiciary that can resolve disputes impassively, and enforce the separation of powers. It is for these same reasons that the maintenance of public confidence in the independence and impartiality of courts is a compelling interest under the First Amendment.

B. Fundraising Associated With Campaigns For Judicial Office Has Diminished Public Confidence In The Impartiality Of The Courts.

Fundraising associated with campaigns for judicial office has diminished the public's confidence that courts

are independent and impartial.[45] In surveys conducted over the past thirteen years, an overwhelming majority of voters have reported that they believe campaign contributions are inconsistent with judicial independence. For example, in 2001, 76 percent of voters reported believing that campaign contributions have at least "some influence" on judicial decision-making.[46] By 2011, the number of voters who reported believing that campaign contributions have at least "some influence" on judicial decision-making rose to 83 percent,[47] and, in 2013, that figure rose to 87 percent.[48] According to recent studies, a majority of citizens also believe that candidates for judicial office cannot be impartial if they have accepted campaign contributions.[49]

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[45] *See, e.g.*, James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and 'New-Style' Judicial Campaigns*, 102 Am. Pol. Sci. Rev. 59, 72 (2008).

[46] Greenberg Quinlan Rosner Research Inc., et al., *2001 National Bipartisan Survey*, 4 (2001), *available at* http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf.

[47] 20/20 Insight LLC, *National Registered Voters Frequency Questionnaire*, 2 (2011), *available at* http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf.

[48] 20/20 Insight LLC, *Public Opinion Poll*, 3 (2014), *available at* http://www.justiceatstake.org/file.cfm/media/news/toplines337_B2D51323DC5D0.pdf.

[49] *See* James L. Gibson & Gregory A. Caldeira, *Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey*, 10 J. Empirical Legal Stud. 76, 85 (2013)

That campaign contributions to candidates for judicial office have in recent years alienated an increasing number of citizens is not surprising. During this period, fundraising in connection with campaigns for judicial office has risen significantly.[50] Moreover, this significant rise in fundraising largely has been driven by discrete groups, many of which are repeat players in the legal process.[51] As more campaign contributors appear before recipient judges in court, accusations of bias become more resonant.[52]

This Court has recognized that allowing candidates for judicial office to accept campaign contributions can diminish public confidence in the impartiality of the judiciary. *See, e.g.*, *Caperton*, 556 U.S. at 886 (noting

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[hereinafter *Judicial Impartiality*] (54 percent of respondents believe that a judge who accepts campaign contributions cannot be impartial); James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of State Courts*, 74 J. Pol. 18, 26 (2012) [hereinafter *Campaign Support*] (58 percent of respondents believe that a judge who accepted campaign contributions cannot be impartial).

[50] Between 2000 and 2009, the amount of campaign contributions made to candidates for judicial office exceeded the amount of the same campaign contributions made in the decade prior by nearly 150 percent. Shepherd, *supra* note 2, at 1.

[51] *See supra* Part I(A) at 7.

[52] *See, e.g.*, Kang & Shepherd, *supra* note 3, at 85 (finding that nearly one-third of state supreme court cases involve business interests); Goodman, *supra* note 30, at 815 (finding that 60 percent of cases before Pennsylvania Supreme Court involved campaign contributors during 2008 and 2009 terms).

that "fears of bias can arise when—without the consent of the other parties—a man choose[s] the judge in his own cause," as by making campaign contributions to a judge who will review his case); *see also White*, 536 U.S. at 790 (O'Connor, J., concurring) ("Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.") But research indicates that campaign contributions reduce public confidence in the impartiality of the judiciary even when the contributions are rejected. Indeed, a significant percentage of voters believe that judges cannot remain impartial when adjudicating the claims of entities and parties who have offered to make campaign contributions, even when the offered contribution has been refused.[53] The perceived relationship between potential contributors and candidates for judicial office is apparently sufficient to imperil public confidence in the courts.[54]

The diminished public confidence in courts that is associated with fundraising for judicial elections cannot be addressed through recusal. Although recusal rehabilitates the perceived independence and impartiality of courts, it does not restore public confidence to levels that obtain before candidates for

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[53] *See, e.g.*, Gibson and Caldeira, *Judicial Impartiality*, *supra* note 49, at 85 (22.8 percent of respondents believe judge cannot be impartial even after rejecting campaign contributions).

[54] *See* Gibson and Caldeira, *Campaign Support*, *supra* note 49, at 32.

judicial office are forced to raise funds for their campaigns.[55] Accordingly, states cannot arrest the decline of public confidence in their courts without addressing directly the fundraising associated with campaigning for judicial office. Canon 7(C)(1) does just that.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be affirmed.

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[55] *Id.* at 32-33.

APPENDIX

APPENDIX

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AMICUS CURIAE BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

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INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., is an advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues. Prominent among Public Citizen's concerns is combating the corruption, and appearance of corruption, of governmental processes that can result from infusions of private money into campaigns for public office. Public Citizen therefore seeks to enact and defend workable and constitutional campaign finance reform legislation at both the federal and state levels. Public Citizen and its attorneys have been involved in various capacities, including as amicus curiae and counsel, in many cases in this Court and others involving the constitutionality of such legislation.

Public Citizen also has a longstanding interest in the actual and perceived fairness of our judicial systems. That concern is acutely implicated by this case and others involving the potentially distorting effects of campaign contributions on the administration of justice and on public confidence in the courts. Thus, Public Citizen has consistently advocated sensible limits on the raising of campaign contributions by judicial candidates in states that have chosen to elect their judges, while at the same time respecting the First Amendment rights of such candidates to engage in campaign activities. *See, e.g.*, Brief of Amicus Curi-

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

ae Public Citizen in Support of Reversal, *Repub. Party of Minn. v. Kelly*, No. 01-521 (U.S. filed Jan. 2002).

Democracy 21 is a non-profit, non-partisan policy organization that works to eliminate the undue influence of big money in American politics and to ensure the integrity and fairness of our democracy. It supports campaign finance and other political reforms, conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws, and engages in efforts to help ensure that campaign finance laws are effectively and properly enforced and implemented. Democracy 21 has participated as counsel or amicus curiae in many cases before this Court involving the constitutionality of the campaign finance laws.

SUMMARY OF ARGUMENT

States that choose to give their citizens a direct say in electing judges do not forfeit the right to protect the appearance and reality of a fair judicial system. Elected judges, no less than appointed judges, must not only be, but also appear to be, fair and impartial as between the parties who appear before them. Florida's restriction on personal solicitation of campaign contributions by judicial candidates is an appropriate and constitutional tool for protecting the integrity of its courts—and the critically important public perception of their integrity.

Like other regulations of campaign contributions, Florida's restriction on solicitations by judicial candidates is constitutional under the First Amendment if it is closely drawn to serve a sufficient state interest. The vital state interest here—preservation of the judicial system's appearance of impartiality—is more

than sufficient. Indeed, this Court's recent campaign finance decisions addressing the scope of the legitimate governmental interest in combating corruption in elections for *political* office underscore the differences between elections for judicial and political office and the significance of a state's interests in protecting judicial integrity through regulations applicable solely to judicial elections. Critical to the Court's analysis in those cases was the view that favoritism and influence are to some degree inherent and expected attributes of representative politics. Quite the opposite is true of judicial officers: Favoritism, influence, preferred access, and ingratiation have no place in judicial decisionmaking, and all states have compelling interests in protecting the actual and perceived neutrality of judges.

Florida's restriction of solicitation by judicial candidates directly serves those interests. Political contributions to judges can create at least the appearance, and quite possibly the reality, of judicial partiality and harm the judicial system's legitimacy. Although contributions may be an inherent feature of privately financed judicial election campaigns, restrictions targeting solicitation aim at the transaction in the fundraising process that is most likely to create the appearance or reality that justice is for sale: The judicial candidate's direct request for financial support from a donor who is or may be interested in the outcome of cases the candidate, as judge, is supposed to preside over with strict neutrality.

After-the-fact remedies, such as recusal, do not obviate the need to restrict practices at the root of the problem. Even assuming their efficacy, which is doubtful in all but extreme cases, such remedies in-

volve substantial systemic costs and difficulties. Measures such as the Florida rule that aim at preventing rather than palliating appearances of partiality are superior—and constitutional—ways of pursuing the state's interest in protecting its judicial system.

ARGUMENT

I. States may limit solicitation of campaign contributions to serve sufficiently important government interests.

This Court has long held that restrictions on campaign contributions are not subject to strict First Amendment scrutiny, but to "a lesser but still rigorous standard of review," under which "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 29, 25 (1976); internal quotation marks omitted); *see also* Pet. Br. 12 (conceding application of "closely drawn" review to contribution restrictions).

That standard reflects the Court's recognition that laws affecting contributions impose a lesser restriction on the communication of campaign messages and on political association than do direct limits on campaign spending. *Buckley*, 424 U.S. at 20, 21–22; *see also McConnell v. FEC*, 540 U.S. 93, 135–37 (2003). The Court's opinions have consistently ad-

hered to these views, and the Court has declined repeated invitations to reconsider them.[2]

The Court's application of the standard has also reflected its recognition that because contributions involve direct transactions between candidates and contributors, they may pose substantial threats to the integrity of officeholders and electoral processes. *See Citizens United*, 558 U.S. at 356–57; *McConnell*, 540 U.S. at 136–37; *Buckley*, 424 U.S. at 26–27. Thus, not only has the Court applied a less stringent standard to laws restricting contributions, it has also been much more likely to find that such laws survive scrutiny under the applicable standard than to sustain campaign finance laws that more directly limit campaign speech. The same is true of Justices who have expressed disagreement with the Court's standard of review: They, too, have similarly recognized that the receipt and solicitation of contributions poses distinctive risks to the integrity of officeholders that may justify restrictions under the First Amendment. *See, e.g.*, *McConnell*, 540 U.S. at 308 (Kennedy, J., concurring in part and dissenting in part).

These principles are fully applicable to the restriction on solicitation of contributions by judicial candidates at issue here. Soliciting and making a

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[2] *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1445; *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011); *Citizens United v. FEC*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring); *Randall v. Sorrell*, 548 U.S. 230, 246–48 (2006) (opinion of Breyer, J.); *FEC v. Beaumont*, 539 U.S. 146, 149 (2003); *FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981); *see also Repub. Nat'l Comm. v. FEC*, 130 S. Ct. 3544 (2010) (summarily affirming 698 F. Supp. 2d 150 (D.D.C. 2010)).

campaign contribution are two sides of the same transaction, and the Court has accordingly treated them similarly in its First Amendment analysis. Thus, as the Court put it in sustaining limits on solicitation in *McConnell*, "for purposes of determining the level of scrutiny, it is irrelevant that [a law] regulate[s] contributions on the demand side rather than the supply side." 540 U.S. at 138; *see also id.* at 177 (applying "closely drawn" standard to limits on solicitation). Likewise, in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), the Court upheld a limitation on solicitation of contributions by a political action committee under *Buckley*'s standard of scrutiny for contribution limits. *See id.* at 208.

The "relevant inquiry," as the Court has explained, is whether a restriction on solicitation of contributions "burdens speech in a way that a direct restriction on the contribution itself would not." *McConnell*, 540 U.S. at 138–39. Unless it does so, its constitutionality turns on the same considerations that govern restrictions on contributions. In this case, the solicitation prohibition is actually *less* restrictive than a direct restriction of contributions, as it does not impede supporters of a candidate from associating themselves with his campaign or the candidate's committee from raising the funds needed to compete in privately financed elections. Thus, the restriction is properly treated as a regulation of contributions for First Amendment purposes.

Justice Kennedy's partial concurrence and dissent in *McConnell*, which joined the majority in upholding a ban on the solicitation of soft money by federal candidates and officeholders, likewise recognized that the solicitation prohibition served the same interests as,

and could be sustained by the same rationale as, the contribution limits upheld in *Buckley*. *See id.* at 308. Justice Kennedy began with the premise that "the regulation of a candidate's receipt of funds furthers a constitutionally sufficient interest," *id.*, and concluded that "regulation of a candidate's solicitation of funds" likewise "does further a sufficient interest"—even if, as in the statutory provision at issue in *McConnell*, the funds are solicited for someone else. *Id.* The reason, as Justice Kennedy explained, is that "[r]ules governing candidates' or officeholders' solicitation of contribution are ... regulations governing their receipt of *quids*," and such regulations are sustainable "under *Buckley*'s anticorruption rationale." *Id.* at 308.

II. Preserving the reality and appearance of judicial impartiality is a sufficient, and indeed compelling, governmental interest.

The state interest against which the restriction at issue here must be assessed is the "vital state interest" in "maintain[ing] the integrity of the judiciary and the rule of law." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009). Protection of that interest requires that the Court give due regard to the differences between judicial office and political office in determining the nature of the interests that justify restrictions on campaign fundraising. Because both the due process rights of the persons who appear before the courts and the public's "respect for [their] judgments depend[] ... upon the issuing court's absolute probity," *Repub. Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring), avoiding appearances of partiality, influence, preferential ac-

cess, or ingratiation are state interests of the highest order where judicial elections are at issue.

The legitimate scope of these interests contrasts with the considerations this Court's recent decisions have applied in cases addressing campaign finance restrictions applicable to elections for *political* office. In those cases, the Court has stated, a regulation "must ... target what we have called '*quid pro quo*' corruption or its appearance"—that is, "a direct exchange of an official act for money." *McCutcheon*, 134 S. Ct. at 1441. Moreover, the Court has stated that the government may not treat the "[i]ngratiation and access" that may result from financial support of a candidate for political office as corruption, *id.*, nor may it "seek to limit the appearance of mere influence or access." *Id.* at 1451.

These conclusions rest on the majority's analysis of the nature of representative politics, not the functions of judicial elections or elected judges. As the Court explained in *Citizens United*, adopting a passage from Justice Kennedy's opinion in *McConnell*:

> Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

Citizens United, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part)).

For these reasons, *Citizens United* said, the likelihood that campaign spenders and contributors "may have influence over or access to elected officials does not mean that these officials are corrupt." *Id.* Nor, the Court said, will "[t]he appearance of influence or access ... cause the electorate to lose faith in our democracy." *Id.* at 360. Rather, the Court has said, the "[i]ngratiation and access" that result from financial support for candidates "embody a central feature of democracy—that constituents support candidates who share their believes and interest, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon*, 134 S. Ct. at 1441.[3]

That analysis does not apply with respect to the interests a state may pursue in protecting the integrity of judicial elections. Even if "[f]avoritism and influence" are inevitable in "representative politics," *Citizens United*, 558 U.S. at 359, judicial elections are not exercises in *representative* politics. Judges, whether appointed or elected, are not charged with representing constituencies, but with dispensing justice without

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[3] The Court's statements in *McCutcheon* and *Citizens United* about the scope of the governmental interest in preventing corruption and its appearance were disputed by the dissenters in both cases, who argued that they were inconsistent with previous decisions of the Court stretching from *Buckley* to *McConnell*. *See McCutcheon*, 134 S. Ct. at 1466–71 (Breyer, J., dissenting); *Citizens United*, 558 U.S. at 447–52 (Stevens, J., dissenting); *see also McConnell*, 540 U.S. at 150–54. Although amici believe the position of the dissenters is correct, there is no need to reargue the merit of those criticisms here.

fear or favor. Favoritism, preferential influence or access, ingratiation, and responsiveness to donors are all anathema to the judicial process, which is defined by "the actuality of fairness, impartiality and orderliness." *In re Gault*, 387 U.S. 1, 26 (1967). Indeed, even the appearance of such improper influence, access, or ingratiation is unacceptable, *see id.*, as "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 13 (1954).

These principles are so fundamental that this Court has long held them to be constitutional requirements incorporated in the Due Process Clause. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Due process does not permit any temptation that might lead a judge "not to hold the balance nice, clear, and true" between the parties. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Moreover, due process requires not only the absence of "actual bias," but the absence even of its appearance. *Murchison*, 349 U.S. at 136.

The requirement of judicial neutrality extends equally to elected and appointed judges: The demands of due process do not vary depending on the manner in which a judge found his way to office. *See, e.g.*, *Caperton*, 556 U.S. at 882–90. Moreover, due process requirements do not fully define a state's interests in ensuring the fairness of its judicial proceedings. States have legitimate interests in preserving an appearance of impartiality in their judicial systems that exceeds the minimum required by due process, and the states have sought to pursue those interests in a variety of ways that may be "more rigorous" than what the Due Process Clause requires. *Id.* at 889. A state's interests

also may properly reflect the concern that public confidence in the impartiality of the judiciary is more likely to be shaken by appearances of political favoritism and influence than by similar appearances in the legislative arena, where some may see such preferences as "expected" or proper. *McCutcheon*, 134 S. Ct. at 1441.

For these reasons, in its one previous decision in a First Amendment challenge involving restrictions on judicial candidates, the Court did not contest that states have a sufficient, and indeed compelling, interest in ensuring that judicial elections do not compromise the appearance or reality of judges' impartiality as between the parties who appear before them. *See White*, 536 U.S. at 775–76. To the contrary, the Court emphasized that "[i]mpartiality in this sense" is essential to "assure[] equal application of the law." *Id.* Justice Kennedy, in concurrence, likewise emphasized that "[j]udicial integrity is ... a state interest of the highest order." *Id.* at 793 (Kennedy, J., concurring).

The Court in *White* held that laws censoring judicial candidates' expression of ideas about legal issues do not serve the interest in protecting judicial impartiality, and that a state that chooses to elect its judges may not "leav[e] the principle of elections in place while preventing candidates from discussing what the elections are about." *Id.* at 788 (majority opinion).[4] But the Court did not denigrate the states' interest in preserving the reality and appearance of judges' impartiality as between the parties who appear before

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[4] *White*, moreover, was a direct restriction on core speech and was not subject to the less stringent review to which this Court has subjected limits on the raising of campaign contributions.

them. And it did not suggest that the First Amendment requires it to ignore the fundamental differences between judicial and political office in determining whether the state has "accord[ed] participants in [the electoral] process ... the First Amendment rights that attach to their roles." *Id.* (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). One of those fundamental differences is that the favoritism, ingratiation, and influence that the Court's recent opinions see as unavoidable in the context of political elections remain absolutely unacceptable for judges, elected or otherwise.

III. Solicitation of campaign contributions threatens public confidence in the fairness and integrity of elected judges.

Campaign contributions to judicial candidates can corrode the vital state interest in the appearance of judicial impartiality and the public's confidence in the fairness and integrity of elected judges. Polls from 2001 to 2013 consistently show that more than three-quarters of respondents believe that campaign contributions to judges influence their decisions.[5] Even the

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[5] Greenberg Quinlan Rosner Research Inc. et al., *Justice at Stake Frequency Questionnaire* (2001), at 4, http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf (76% believe that campaign contributions have a "great deal" or "some" influence on judges' decisions); Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USAToday.com, Feb. 16, 2009, http://usatoday30.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm (89% of respondents believed that the "influence of campaign contributions on judges' rulings is a problem."); 20/20 Insight LLC, *National Registered Voters Frequency Questionnaire Ref. 2011-184* (2011), at Q6, http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf (83% believe campaign con-

(*Footnote continued*)

judges themselves believe in large numbers that campaign contributions sway their decisions. *See* Greenberg Quinlan Rosner Research Inc., *Justice at Stake: State Judges Frequency Questionnaire*, at Q12 (2001–2002) (finding that 46 percent of state judges believe that campaign contributions influence decisions to some degree).[6]

The public's wariness of decisions made by judges who receive campaign donations is warranted: Studies indicate that the large amount of money pouring into judicial races is correlated with outcomes of cases in ways that, at a minimum, may adversely affect the critically important appearance of judicial neutrality. An analysis of the decisions of 439 state supreme court justices in over 2,000 business-related cases between 2010 and 2012 shows that there is a "significant relationship between campaign contributions from business groups and justices' voting in favor of business interests." Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 9, 13 (2013).[7] An elected judge who receives half of her donations from business

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tributions to judges have a "great deal" or "some" influence on their decisions); 20/20 Insight LLC, *Justice at Stake/Brennan Center National Poll* (2013), at Q8, http://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf (87% of those surveyed believe that both direct campaign donations to a judge as well as spending by outside groups have either "some" or "a great deal" of influence on judges' decisions).

[6] *Available at* http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

[7] *Available at* http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf.

groups would be expected to vote pro-business almost two-thirds of the time, and the correlation has grown stronger over time. *Id.*

A report on 12 years of decisions of the Ohio Supreme Court suggests a similar relationship between contributions and judges' voting behavior. *See* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006.[8] On average, the justices "voted in favor of contributors 70 percent of the time." *Id.* One justice voted for his contributors a startling 91 percent of the time. *Id.*

Nevertheless, the reality that most contested judicial elections occur in states where such elections are privately financed—and that effective campaigning costs money—means that judicial candidates must have some means of financing their candidacies. In the 2011–2012 state court races, nearly two-thirds of the 494 judicial candidates raised money and of those who raised money, 71 percent of the candidates who raised the most money won. Linda Casey, *Courting Donors: Money in Judicial Elections, 2011 and 2012*, Followthemoney.org (Mar. 2014).[9] Consequently, a judicial candidate will personally solicit donations if that option is available. "The one standard for a judicial candidate in Nevada today is, 'How much money can you raise?'" explained Nevada state Judge Brent Adams, who also said that judges should be prohibited from directly soliciting campaign contributions. Mi-

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[8] *Available at* http://www.nytimes.com/2006/10/01/us/01judges.html.

[9] *Available at* http://beta.followthemoney.org/research/institute-reports/courting-donors-money-in-judicial-elections-2011-and-2012/#item_1.

chael J. Goodman and William C. Rempel, *In Las Vegas, They're Playing With a Stacked Judicial Deck*, L.A. Times, June 8, 2006.[10]

The pressure to raise money means that even those who find the campaigning and personal solicitations abhorrent have to engage in them to remain competitive. "It's awful," said the North Carolina Supreme Court Justice Robin Hudson, who ran for reelection in 2014 and often personally solicited contributions. James Oliphant, *When Judges Go Courting*, Nat'l J. Magazine, Oct. 18, 2014.[11]

IV. Canon 7C(1) is tailored to improve public confidence in the judiciary and prevent the appearance of partiality.

A state's regulation of judicial campaign contributions must take into account not only the interest in preserving the public confidence in the impartiality and integrity of its elected judiciary, but also the need to allow judicial candidates the ability to finance their campaigns. Florida's Canon 7C(1), restricting direct solicitation of contributions by judicial candidates, balances these interests by prohibiting the aspect of contributions to judges that is most likely to be abusive and to impair the public's faith in an impartial judiciary, while allowing judicial candidates to raise funds through campaign committees. The restriction is consistent with, and reinforces, other means by which Florida law seeks to promote the state's critical goals of judicial impartiality and nonpartisanship. *See*

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[10] *Available at* http://www.latimes.com/nation/la-na-justice080606-story.html#page=3.

[11] *Available at* http://www.nationaljournal.com/magazine/when-cash-turns-judges-into-politicians-20141017.

Fla. Stat. Ann. §§ 38.01–38.10 (recusal provisions); Fla. Stat. Ann. § 105.071 (providing for nonpartisan judicial elections). And by targeting that part of the campaign contribution transaction that poses the greatest risk of actual bias and is most likely to raise concerns of an appearance of partiality, Canon 7C(1) meets the requirement of an adequate "fit between the stated government objective and the means selected to achieve that objective," while "'avoid[ing] unnecessary abridgment' of First Amendment rights." *McCutcheon*, 134 S. Ct. at 1445–46.

Florida's restriction on solicitation satisfies these requirements by addressing the circumstances that present the greatest opportunity for compromising the appearance or reality of judicial impartiality. The Court has recognized that the risk of explicit or tacit understandings between contributors and candidates is at its highest when a candidate directly requests money from a potential contributor and that restrictions on solicitation are a tailored response to that threat. *See McConnell*, 540 U.S. at 136–37; *id.* at 308 (Kennedy, J., concurring in part and dissenting in part). By contrast, "there is not the same risk of ... corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon*, 134 S. Ct. at 1452.

Where the state has a legitimate interest not only in avoiding actual or apparent quid pro quo corruption, but also the appearance or reality of the favoritism, influence, access, and ingratiation that are antithetical to the judicial process, regulation of solicitation is particularly well suited to protecting that interest. The threat to impartiality and its appearance

is gravest when the solicitor of campaign donations is also the one tasked with being a neutral adjudicator in matters directly affecting the potential contributor's interests.

Thus, when a judge or judicial candidate directly puts the arm on a potential donor, the target has every reason to believe that his response, positive or negative, will be memorable to the judge, and that subsequent encounters will be awkward if not hostile should the contributor not comply. Likewise, written fundraising solicitations signed by a judicial candidate are likely to convey the message that the candidate has targeted the recipient as a potential financial supporter and that the candidate will be paying attention to the response. Such a message conveys the "suggestion, subtle or otherwise," *Tenn. Secondary School Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 298 (2007), that a contribution will be an effective means of currying favor, while not contributing may have a negative effect. The request itself, much more so than other forms of campaign fundraising that are at least one step removed from the potential adjudicator, creates the apprehension that a contribution may be the price of a fair hearing in the judge's courtroom—or of preferential treatment if an opposing attorney or party has not ponied up.

For instance, Nevada does not ban personal solicitation of campaign contributions by judges. *See* Nev. Code of Jud. Conduct, Rule 4.4, cmt. 1. One prominent Nevada attorney described how some lawyers "are in almost terror of not giving" to judges asking for campaign contributions. *In Las Vegas, They're Playing With a Stacked Judicial Deck*, *supra*. "When

judges come around and say, 'I need money,'" the attorney continued, "it's a nasty bit of business." *Id.*

Restricting solicitation by judicial candidates is thus consistent with the Court's acceptance, in other contexts, of "rules prohibiting direct, personalized communication in a coercive setting." *Brentwood Acad.*, 551 U.S. at 296. Indeed, the interests supporting the restriction here are heightened because the implicitly coercive nature of the request is destructive not only of the perception of judicial fairness of those who are touched for contributions, but also of public confidence in the judiciary: Public awareness of judicial solicitations and their inevitable effects will erode the perception that the courts are fair and impartial to all and contribute to the view that, like legislatures, they are arenas where favoritism, influence, preferential access, and ingratiation hold sway, and where judges, like political officeholders, "can be expected to be responsive" to their financial supporters. *McCutcheon*, 134 S. Ct. at 1441.

Where, as here, solicitation itself threatens important state interests, restrictions directly targeting it readily meet First Amendment requirements of fit between ends and means. As the Court pointed out in *McCutcheon*, if solicitation by candidates is the source of the problem, restrictions on "direct solicitation by an officeholder or candidate" may be more narrowly targeted than other forms of regulation of contributions. *Id.* at 1462 (citing *McConnell*, 540 U.S. at 298–99, 308 (Kennedy, J., concurring in part and dissenting in part)). Such restrictions pose no threat to a candidate's ability to communicate substantive messages "discussing what the elections are about." *White*, 536 U.S. at 788. Nor do they impair a candi-

date's ability to compete in a setting where campaigns require private funding, as they allow campaign fundraising even while targeting the fundraising practice most likely to be destructive of the appearance and reality of judicial impartiality. Thus, far from creating a prohibited "substantial mismatch" of ends and means, *McCutcheon*, 134 S. Ct. at 1446, the restriction on solicitation by judicial candidates is closely drawn to advance critical state interests while simultaneously accommodating the need to "accord participants in [the electoral] process ... the First Amendment rights that attach to their roles." *White*, 536 U.S. at 788 (citation omitted).

That the regulation may not prevent every possibility that campaign contributions may influence or appear to influence a judge does not render it invalid. In this area, as in others, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Buckley*, 424 U.S. at 105 (citation omitted). Moreover, a statute "is not invalid under the Constitution because it might have gone further than it did." *Id.* (citation omitted). These considerations are particularly apt when, as here, going further (by, for example, eliminating all private contributions, applying extremely low limits, or regulating communications between the candidate and his or her own campaign committee) might make the states' choice to have judicial elections impracticable or provoke constitutional challenges asserting that the state had gone too far. The state need not achieve the impossible: The fit between ends and means need not be "perfect, but reasonable," representing "not necessarily the single best disposition but one whose scope is 'in proportion to

the interest served ....'" *McCutcheon*, 134 S. Ct. at 1456.

V. Recusal is not a sufficient protection against partiality or the appearance of partiality.

Although recusal of judges is a critically important measure to remedy breakdowns in judicial impartiality, it is not sufficient by itself to safeguard against the risk of bias posed by personal solicitation of donations or to obviate the need to restrict such solicitation. To begin with, as a matter of due process, this Court has held that recusal is a remedy limited to "extreme facts" and "extraordinary situation[s]," *Caperton*, 556 U.S. at 886–87, which do not exhaust the circumstances in which states have an interest in protecting their judicial systems against appearances of favoritism. *See id.* at 888. Such a tool is unlikely to be effective in addressing the pervasive problems that stem from solicitation practices that, if not restricted, are likely to become ubiquitous.

Even where, as in Florida and under federal recusal statutes, governments have asserted their powerful interests in the appearance of judicial impartiality by making recusal available in a broader set of circumstances than those where it would be constitutionally required, recusal may be both underused and underenforced. *See* James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, Brennan Center for Justice, 20 (2008).[12] In many states, including Florida, the judge accused of bias is

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[12] *Available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper_FINAL.pdf.

the judge who first decides the recusal motion. *See* Fla. R. Jud. Admin. 2.330(f); *J.R. v. State*, 959 So. 2d 833, 834 (Fla. Dist. Ct. App. 2007). The risk of angering that judge and the cost of a recusal motion that is unlikely to be successful can thus deter parties from seeking recusal. *Fair Courts: Setting Recusal Standards*, *supra*, at 20. Moreover, the inherent difficulty of judging one's own partiality means that even when a motion is brought, a judge may be strongly inclined not to grant it. *Id.*

A study of campaign contributions to the justices of the Supreme Court of Ohio found that recusal indeed appears to be underenforced. *See Campaign Cash Mirrors a High Court's Rulings*, *supra*. Out of 215 cases before the court identified as raising the most direct potential conflict of interest from campaign contributions, justices recused themselves just nine times. *Id.* A similar result was found in a review of cases before the Louisiana Supreme Court in which there was at least one campaign contributor to a justice before the court. *See* Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors*, 10 Global Jurist 4, 10 (2010).[13] Between 1992 and 2006, a Louisiana justice ruled on a contributor's case in 425 instances. *Id.* at 4. There was not a single recusal. *Id.*

Recusal, moreover, imposes significant costs of its own. Recusal motions may generate satellite litigation and appeals that raise difficult line-drawing questions and consume resources of litigants and courts. *See*

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[13] *Available at* http://www.ewi-ssl.pitt.edu/econ/files/courses/101221_misc_viewcontent.pdf.

Caperton, 566 U.S. at 893–99 (Roberts, C.J., dissenting). When recusal motions are denied by a challenged judge, their resolution on appeal may result in reopening of judgments, necessitating relitigation of issues already addressed once in a tainted proceeding. *See* Fla. Stat. Ann. § 38.07 (providing that a recused judge's rulings are subject to reconsideration); *see also Liljeberg v. Health Servs. Acquisition Corp.*, 496 U.S. 847, 862–63 (1988) (affirming the granting of a new trial as a remedy for a judge's failure to recuse). Moreover, when a judge is sidelined by a well-founded motion for recusal, another judge must step in, straining the court system's resources. And frequent recusals, or even recusal motions, may themselves impair public confidence in judges by confirming popular impressions that judicial partiality is common or that litigation is a "game" with outcomes determined by lawyerly gambits, connections, and, perhaps, referees who play favorites. *See Caperton*, 566 U.S. at 903 (Scalia, J., dissenting).

Thus, while recusal remains a necessary fail-safe remedy against injustice or its appearance, recusal is by no means a panacea. A system of wide-open solicitation with resulting recusals would be a broken system, not a fair one. Although bearing the costs of recusal, when it is warranted, is essential if the judicial system is to provide the appearance and actuality of fairness essential to its legitimacy, a far better solution is to avoid circumstances that call judicial fairness into question to begin with. States thus have powerful interests in *preventing* practices that "tempt adjudicators to disregard neutrality," *Caperton*, 556 U.S. at 878, not just in remedying them after the fact. The solicitation restriction at issue here is a critical, and constitutional, tool to achieve that end.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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December 2014

AMICUS CURIAE BRIEF

No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ of Certiorari

To The Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* PROFESSOR JED SHUGERMAN IN SUPPORT OF RESPONDENT

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DECEMBER 22, 2014

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Professor Jed Shugerman is an expert on the history of judicial elections in America,[2] and has written the only in-depth book on that topic, *The People's Courts: Pursuing Judicial Independence in America* (2012). Professor Shugerman's scholarship refutes the notion that States adopted judicial elections in an effort to turn judges into conventional politicians. Rather, history reveals that States adopted judicial elections in order to promote judicial independence and the rule of law, and to protect judges from special interests and the corruption endemic to the States' appointment systems. This pursuit of judicial independence from corrupting influences also drove each successive reform of their judicial-election systems.

Professor Shugerman files this brief to provide historical context relevant to the Court's consideration of the direct solicitation ban, which has been adopted by thirty of the thirty-nine States that elect their judges.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the amicus curiae and their counsel made any such monetary contribution.

[2] *See, e.g.*, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1061 (2010); *The Twist of Long Terms: Judicial Elections, Role Fidelity and American Tort Law*, 98 Geo. L.J. 1349 (2010); *In Defense of Appearances: What* Caperton v. Massey *Should Have Said*, 59 DePaul L. Rev. 529 (2010).

SUMMARY OF ARGUMENT

Bans on direct solicitation of money by judicial candidates are part of a long history in which the States have adopted and reformed judicial elections for the express purpose of protecting courts against the reality and appearance of improper influence.

This historical reality is contrary to a perception that the adoption of judicial elections was an open abandonment of judicial independence and impartiality, in favor of treating judges like conventional politicians. Related to this misperception, there is an oft-expressed view that the only solution to the problems that elections pose is to abolish them. As Justice O'Connor put it in her concurrence in *Republican Party of Minnesota v. White*, "[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges." 536 U.S. 765, 792 (2002).

Plainly, the "States are free to choose [judicial elections] rather than, say, appointment and confirmation." *Id.* at 795 (Kennedy, J. concurring). And having done so, States may adapt their election rules to pursue judicial integrity, "despite the difficulties imposed by the election system." *Id.* at 796.

Thirty-nine States have adopted elections as the means for choosing judges, and the historical context of their adoptions bolsters the case for following the precedents of deference to State choices in judicial selection.

Parts I and II set out that history, culminating with the adoption, beginning in 1972, by thirty of the States with judicial elections, of the prohibition on

direct solicitation of money by judicial candidates at issue in this case. The widespread adoption of this rule, in the face of the increasing importance that money has come to play in modern elections, reflects the States' pursuit of the "hard task" of "codify[ing] the essence of judicial integrity." *Id.* at 793 (Kennedy, J. concurring).

Part III concludes by discussing real-world instances of direct solicitation abuse, and suggesting that the very widespread adoption of the direct solicitation ban is a targeted rejection of conduct that invites actual corruption and the public appearance of improper influence.

ARGUMENT

I. THIRTY-NINE STATES HAVE TURNED TO JUDICIAL ELECTIONS IN ORDER TO PROTECT JUDICIAL INDEPENDENCE AND AVOID THE APPEARANCE AND REALITY OF IMPROPER INFLUENCE AND BIAS.

Historically, the States have exercised broad sovereign powers to protect the public integrity of their judiciaries against the probability and appearance of bias. Indeed, the history and evolution of state judicial systems exemplifies the States' critical "'role as laboratories for experimentation to devise various solutions where the best solution is far from clear.'" *See Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1630 (2014) (Kennedy, J., plurality op.) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

A. States Created Judicial Elections To Promote Judicial Independence From The Other Branches And From Special Interests.

Judicial independence has long been a central principle in the structure of state governments. Indeed, even during the colonial era, an independent judiciary was seen as an inalienable feature of republican government. *See, e.g.*, The Declaration of Independence para. 11 (U.S. 1776) ("[King George] has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and payment of their Salaries."). Once the colonies won their independence, the States sought to structure their judiciaries in a way that prevented this kind of judicial dependency and adopted varying models to achieve that end: four adopted a model of executive appointment and legislative consent, four others chose legislative election, three combined legislative election and tenure "at pleasure," and two provided judges with seven-year terms instead of life tenure. Evan Haynes, *The Selection and Tenure of Judges* 101–33 (1944).

Despite these initial efforts to guard against dependence upon and influence from a central power, by the early nineteenth century state judiciaries were beholden to the legislature, the executive, and, by extension, the parties that controlled each. Governors with the power of appointment typically nominated persons supporting their agendas, and then threatened those judges with removal if they behaved independently. *See, e.g.*, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* 613 (1846). Similarly, state legislatures controlled

not only the salaries, fees, and removal of state judges, *see* Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 161 (1969), but also the substance and finality of their judgments, *see* Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention, in* The Constitution 93, 97 (James Morton Smith ed., 1971).

As one example, "[t]he New Hampshire legislature regularly vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes." *Id.* And in the 1820s, Missouri and Kentucky each removed their entire supreme courts prior to the expiration of their terms as a way of imposing shorter, unanticipated term limits upon what had become a disfavored bench. W.J. Hamilton, *The Relief Movement in Missouri, 1820-1822*, 22 Mo. Hist. Rev. 51, 89–90 (1927).

Against this backdrop, a severe economic depression in the 1840s precipitated a desire to free the judiciary of its dependence on the political branches. The 1840s depression led to the recognition that state legislatures had been overspending on canals, roads, and railroads—and often with political insiders and special interests corrupting the spending process. *See* Jed Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1061, 1076–80 (2010). This overspending drove nine

States into default, and led to the closing of half of America's banks. Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839-1865*, at 75-76 (2001). Fiscally conservative reformers campaigned for constitutional conventions to impose new spending limits on legislatures. *See* Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, *in* Toward a Usable Past 388, 401 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

Legislative excess, however, was not the only target of public ire. Reformers partly blamed judges for having been captured by legislators and governors, so that they did not check the other branches sufficiently. *See, e.g.*, *Debates and Proceedings in the New-York State Convention for the Revision of the Constitution* 651 (S. Croswell & R. Sutton reporters, Albany, Albany Argus 1846) (remarks of delegate Amos Wright) ("Who selects most of your judges now? The politicians of a party caucus."). As a result, the reformers sought to create a new state judiciary that would be more independent from governors and legislatures—and more independent from the forces of corruption. *See, e.g.*, *The Constitutional Debates of 1847*, at 466 (Arthur Charles Cole ed., 1919) (remarks of delegate Archibald Williams).

To achieve such judicial independence, States began selecting judges through popular elections. Although a few States, including Georgia and Mississippi, experimented early on with judicial elections, it was not until New York debated the merits of, and ultimately adopted, judicial elections at its 1846 state constitutional convention that a

national trend began. *The People's Courts*, *supra* at 57-86 (collecting authorities from each state); *see also* Shugerman, *Economic Crisis*, *supra* at 1096 (detailing the frequency of state constitutional conventions during the nineteenth century, through which the States addressed a broad array of problems, often "learn[ing] from one another's mistakes" in one decade and "borrow[ing] heavily from one another's constitutional innovations" in another).

Notably, the States adopted judicial elections for the express purpose of liberating judges from partisan interests and "increas[ing] fidelity" to the people. *See Report of New York Constitutional Convention*, *supra* at 645 (remarks of delegate Ira Harris); *see also The People's Courts*, *supra* at 104-116 (collecting state data). As one commentator put it, "make [judges] elective by the people, and then indeed will we have an independent judiciary." Veto, *Letter to the Editor*, *reprinted in* Samuel Medary, The New Constitution at 206, July 28, 1849.

For States in the early to mid-nineteenth century, therefore, "popular election was not viewed as inconsistent with the ideal of a powerful independent judiciary." Phillip L. Dubois, Special Issue, *Accountability, Independence and the Selection of State Judges: the Role of Popular Judicial Elections*, 40 S.W. L.J. 31, 35 (1987). To the contrary, judicial elections were seen as essential to an independent judiciary as well as the state constitutions' promises "to protect the rights of the people." 2 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1809 (H. Fowler ed., Indianapolis, A.H. Brown 1850) (remarks of Judge Borden). Ultimately, by 1860,

eighteen of the thirty-one States in the Union elected all of their judges, and five additional States elected some of their judges. *The People's Courts*, *supra* at 105 (compiling state data).

It is important to note, however, that mid-nineteenth century campaigns generally did not rely on campaign donations. Judicial candidates ran on a partisan slate, and parties campaigned to get out the vote for their candidates. *See* Jed Shugerman, *The Twist of Long Terms*, 98 Geo. L. J. 1349, 1379–90 (2010). Parties raised the bulk of the money, rather than the candidates themselves, and moreover, parties raised a large amount of their money from their office-holders as part of the spoils system of kicking back public salaries to the local party. *Id.* Thus, the state reformers that adopted judicial elections were not embracing a system of direct judicial fundraising. *Id.*

B. States Have Enacted Wide-Ranging Reforms To Ensure The Public Legitimacy Of Their Judiciaries And Avoid The Probability Of Bias.

Although the turn to judicial elections largely succeeded in removing legislative and gubernatorial influence from the process of judicial selection, this change produced new threats of undue influence, or the appearance of such, over the state judiciaries. In response to these emerging sources of influence, States enacted a series of modest reforms aimed at ensuring the public legitimacy of their judiciaries and avoiding the appearance of partiality.

The initial concern facing States that adopted judicial elections was the significant role that political parties played in the elections and the

corruption that ensued. As contemporaneous documentation and historical accounts show, judicial elections during this period were often close and hotly contested, which increased coalition politics and known corruption. In California, for instance, elections were swung by party machines more than the candidates themselves. 1 E.B. Willis & P.K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California* (1880). And in Pennsylvania, a brand of urban machine politics reigned, leading to the tyranny of local political bosses of the majority party. Mahlon H. Hellerich, *The Origin of the Pennsylvania Constitutional Convention of 1873*, 34 Penn. Hist. 158 (1967). That corruption increased over time is evidenced by the fact that more New York judges were awaiting trial for official corruption in 1872 alone than from 1777 to 1846. Renee Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 Geo. Mason L. Rev. 109, 157 (2007).

In the 1860s and 1870s, several States began extending judges' terms as a means to insulate judges from party machines and corruption and thus avoid the appearance of impropriety and risk of undue influence on their judiciaries. *The People's Courts*, *supra* at 144-54 (compiling state data). As explained by James Bryce, "short terms . . . oblige [the judge] to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence." James Bryce, 1 *The American Commonwealth* 455 (1906).

In the decades that followed, States continued to view party politics as a threat to the integrity of their judiciaries. Because party connections still determined the nominations process, elected judges were perceived as being beholden to partisan interests, and their independence and integrity were questioned once on the bench. *See, e.g.*, Robert Cushman, *Non-Partisan Nominations and Elections*, 106 Annals Am. Acad. Pol. & Soc. Sci. 83 (1923); Barry Friedman, *The Will of the People* 183 (2009) (citing a study by the National Economic League led by William Howard Taft). Even the Governor of Nebraska alleged that courts were "composed of lawyers who owe their position, not so much to legal attainment and profound learning, as they do to political service rendered." Gilbert E. Roe, *Our Judicial Oligarchy* 14 (1912) (quoting Gov. Aldrich).

Moreover, judicial elections remained hotly contested. For example, an 1889 Pennsylvania election for lower court seats was tainted by bribes, bitter personal fights, and a guerilla newspaper war waged in a way that lessened respect for the judiciary. *The Westmoreland Judgeship*, Pittsburgh Com. Gazette, Oct. 24, 1889; *The Thirty-Fifth Judicial District*, Pittsburgh Com. Gazette, Oct. 30, 1889. Likewise, in an 1894 New York election, partisan thugs and "gangs of rowdies" beat each other in a "free for all scuffle" at the ballot box. John Fabian Witt, *The Accidental Republic* 157, 281 n.22 (2004) (quoting *First Round for Warner*, N.Y. Herald, June 12, 1894).

In the 1910s, States began adopting non-partisan judicial elections to address these revitalized concerns of partisanship, special interests, and

corruption. In 1911, Ohio passed the Non-Partisan Judiciary Act and then raised the issue again a year later at its high-profile 1912 convention, where it implemented direct party primaries to precede the nonpartisan election. Ohio Rev. Code Ann. 3505.04; *Proceedings and Debates of Ohio Constitutional Convention of 1912*, at 1051–52 (J.V. Smith reporter, 1851). By the end of the decade, eight other States followed Ohio's lead, with ten more adopting nonpartisan elections soon thereafter. *The People's Courts*, *supra* at 160 (collecting state data).

Once implemented, certain States concluded that nonpartisan elections were not as effective in protecting judicial independence as was desired. Instead, because judicial candidates could not rely on party organization to raise money, make connections, and get out the vote, candidates turned to special interest groups, including organized crime, for funding. 9 *Transactions of Commonwealth Club of California*, 311–12 (1914), *in* Lamar T. Beman, *Election versus Appointment of Judges*, 65 (1926). Moreover, observers recognized that as judicial candidates could no longer rely on party identification to get elected, these candidates had to raise even more money directly, and campaign even more aggressively. These problems set the stage for a sweeping new round of reforms in favor of judicial independence from financial corruption. *The People's Courts*, *supra* at 170-76 (collecting data).

In light of these challenges, in the 1920s and 1930s, the American Bar Association and the American Judicature Society proposed the adoption of what is now known as the merit selection system. Under this model, a nominating commission, which

includes representatives of the state bar, selects a short slate of candidates, and the governor chooses one person from that slate. Once nominated, the judge sits an initial term and then runs in a yes-or-no retention election. *See, e.g.*, *id.* at 185.

In 1937, the Missouri Bar Association grew tired of the political corruption that its judiciary faced and created the Missouri Institute for the Administration of Justice. This organization outlined a five-part merit selection process that was eventually passed by voters in 1940. Charles B. Blackmar, *Missouri's Nonpartisan Court Plan from 1942 to 2005*, 72 Mo. L. Rev. 199 (2007). Building upon this success, and the success of California a few years prior, many state and local reformers in the 1950s championed "The Missouri Plan" as a critical reform to address the difficulties that arose under partisan and nonpartisan election models. Ultimately, nineteen States adopted the merit selection system wholesale and another nine chose to incorporate certain parts of it. *The People's Courts*, *supra* at 208 (collecting data).

The nineteenth and twentieth centuries thus saw major reforms by the vast majority of States. Following the adoption of judicial elections, the States devised and employed widely diverse approaches to improving their judiciaries, each stage driven by the goal of protecting judges from corruption. By 1990, thirty-nine of the fifty States directly elected their judges: seven retained partisan elections; thirteen used nonpartisan elections and two more used nonpartisan elections after a partisan nomination; sixteen adopted retention elections; and the final two relied on legislative elections. *Carey v.*

Wolnitzek, 614 F.3d 189, 211–13 (6th Cir. 2010) (compiling data on state elections in Appendix).

II. SINCE 1972, THIRTY OF THE THIRTY-NINE STATES THAT ELECT THEIR JUDGES HAVE BANNED DIRECT SOLICITATION OF MONEY BY JUDGES AND CANDIDATES.

In recent decades, there have been vast increases in the amount of money spent on judicial elections. Between 1990 and 2008, States saw a 700% increase in the amount of money raised per election cycle by state supreme court candidates. Lawrence Lessig, *Republic, Lost* 229 (2011). In 2002 alone, Florida's judicial elections at the trial level alone cost $16 million—nearly half the amount spent that year collectively in state-wide legislative races. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L.J. 1077, 1080 n.13 (2007).

These "growing sums of money" used to "influence the outcome of a judicial election" make it "hard to have faith that we are selecting judges who are fair and impartial." *See* Justice Sandra Day O'Connor, *How To Save Our Courts*, Parade, Feb. 24, 2008.

In view of the variations in the judicial electoral systems adopted by the States, it is notable that those States have responded with substantial consistency to these new challenges. In more than 75% of the States "with judicial elections, judicial candidates have been barred from *personally* soliciting campaign funds." Roy A. Schotland, *Six Fatal Flaws: A Comment On Bopp And Neeley*, 86 Denv. U. L. Rev. 233, 235 (2008) (emphasis in original). At the outset certain States implemented a precatory approach to direct solicitation bans, as was

initially suggested by the ABA in 1972. *See* American Bar Association, *Model Code of Judicial Conduct*, Canon 7(B)(2) (1972) (providing that a candidate "should not himself solicit or accept campaign funds"). As time passed, however, these States recognized the need for a clear prohibition on direct solicitations and adopted the mandatory language of the 1990 ABA Model Code of Judicial Conduct. *See* American Bar Association, *Code of Judicial Conduct*, Canon 5(C)(2) (1990).

By 2010, thirty States had adopted[3] a mandatory prohibition on the direct solicitation of campaign funds by judicial candidates. *See Carey*, 614 F.3d at 211–13 (compiling then-current data on state elections).

III. THE DECISION TO BAR DIRECT SOLICITATION OF MONEY BY JUDICIAL CANDIDATES ADVANCES THE VITAL INTEREST IN A FAIR, INDEPENDENT, AND IMPARTIAL JUDICIARY—AND ONE THAT APPEARS TO BE SUCH.

Viewed in historical context, in which most States decided to adopt judicial elections as a means of establishing judicial independence, and then to

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[3] At least three states—Kentucky, Georgia, and North Carolina—have repealed or substantially altered their bans in light of adverse judicial decisions. *See* ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, *Background Paper*, http://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/background.html (last visited December 20, 2014) (citing *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc), and *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002)); *see also Carey*, 614 F.3d at 189.

adopt various reforms aimed at curbing abuses and threats to the reality and perception of judicial integrity, the ban on personal solicitation of money is a rare instance in which the States have spoken almost with one voice. Indeed, this prohibition is an obvious step for States that have adopted electoral systems while remaining vigilant to defend against evolving threats of bias and corruption, and the appearance of such.

While "[t]o comprehend, then to codify, the essence of judicial integrity is a hard task," *White*, 536 U.S. at 793 (Kennedy, J., concurring), the decision to bar candidates from personally requesting money has not been a hard call. That is because the practice of personally asking for money tends inherently to create both the reality and the appearance of bias and undermines public confidence in judicial integrity. Justifiably, States have deemed that practice incongruous with their "vital" interest, recognized by all members of this Court in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009), in ensuring "public confidence in the fairness and integrity of the nation's elected judges." Allowing such bald, personal appeals for money is no way to "maintain a fair, independent, and impartial judiciary—and one that appears to be such." *Id.* at 890 (Roberts, C.J., dissenting).

As this Court has noted in a number of contexts, personal solicitation "exert[s] pressure" on recipients and "demands an immediate response, without providing an opportunity for comparison or reflection." *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (upholding state bans on lawyer solicitation); *see also United States v. Kokinda*, 497

U.S. 720, 734 (1990) (plurality op.) (upholding a federal ban on political solicitation). If this is true of solicitation by lawyers, or advocates outside of a post office, it cannot be any less true of those who possess, or seek to possess, the power of a state-court judgeship. Indeed, in those jurisdictions without direct solicitation rules, lawyers know they must comply with a judge's demand for money as a "protection against ill fortune" in the courtroom. *See* Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing With a Stacked Judicial Deck*, L.A. Times, June 8, 2006. According to one attorney in such a jurisdiction, "Giving money to a judge's campaign means you're less likely to get screwed"—otherwise, "bad things" can happen. *Id.*

Moreover, direct solicitation creates a greater probability of bias than do other fundraising methods. A "realistic appraisal of psychological tendencies and human weakness," *Caperton*, 556 U.S. at 883 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)), indicates that *personally* asking for money opens solicitors to greater opportunity for embarrassment or elation, depending on the success of their efforts. That being so, solicitors will undoubtedly have a greater personal stake in the success or failure of direct solicitation, and thus a concomitantly greater temptation "to disregard neutrality" based on the solicitee's response. *See id.* at 886.

Hence, direct solicitation poses a "regulable *quid pro quo* danger." *See McConnell v. FEC*, 540 U.S. 93, 316–17 (2003) (Kennedy, J. concurring in the judgment in part and dissenting in part). Perhaps as importantly, the appearance of possible bias is

enhanced materially by the fact that the personal nature of the request is perceived by others to give the candidate a more direct personal investment in the solicited party's decision to contribute or not.

The following reports of conduct by judges and judicial candidates suggest why the rule banning direct solicitation has been so universally adopted:

- Judges soliciting money from attorneys "in their chambers in the middle of presiding over their cases." *See, e.g.*, *The People's Courts*, *supra* at 4.
- Soliciting money from attorneys by requiring them "to walk the gauntlet past [the] bailiff and make an appropriate campaign contribution before they could present their arguments." *See, e.g.*, Gerald F. Richman, *The Case For Merit Selection And Retention Of Trial Judges*, 72 Fla. Bar J. 71, 71 (1998).
- Soliciting money from attorneys during an in-chambers conference regarding a pending case and telling one that "he was f***ed because he hadn't contributed while the others had." *See, e.g.*, *In re Sobel*, No. 0405-248 (Nev. Comm'n on Jud. Discipline Aug. 15, 2005).
- Soliciting money from attorneys in a bar by telling one that the "going rate for contributions from attorneys was $500 and that if he did not contribute, he would receive adverse rulings from the [judge] if he was elected." *See, e.g.*, *In re Tennant*, 516 S.E.2d 496, 498 (W. Va. 1999).
- Soliciting money over the phone from an attorney in a pending case, and—after receiving several hundred dollars from the attorney—denying a motion to recuse and granting summary

judgment in favor of the contributor's client. *See, e.g.*, *Aguilar v. Anderson*, 855 S.W.2d 799, 801 (Tex. App. 1993).

- Soliciting money at a "'testimonial' dinner" "from attorneys appearing before" the judge, and accepting $10,000 for "personal expenses" and $2,000 for the "re-election campaign." *See, e.g.*, Marie A. Failinger, *Can a Good Judge Be a Good Politician?*, 70 Mo. L. Rev. 433, 447 (2005).
- Soliciting money from citizens' groups while running for traffic-court judge, telling a motorcycle club: "There's going to be a basket going around because I'm running for Traffic Court Judge, right, and I need some money. I got some stuff that I got to do, but if you all can give me twenty ($20) dollars you're going to need me in Traffic Court, am I right about that?" *See, e.g.*, *In re Singletary*, 967 A.2d 1094, 1096 (Pa. Commw. Ct. 2008).
- Soliciting and receiving $2,500 from an attorney, at a public fundraiser personally hosted by the judge, one day after ruling in favor of that attorney's clients. *See, e.g.*, Julie Fancher, *Dallas County's Judge Carlos Cortez Is Asked to Recuse Himself from Case Involving Campaign Donor*, The Dallas Morning News, Sept. 11, 2014, *available at* http://www.dallasnews.com/news/metro/20140911-judge-carlos-cortez-is-asked-to-recuse-himself-in-civil-case.ece.

These anecdotes underscore the extent to which direct solicitation by judges raises the same "specter of direct corruption," Failinger, *Can a Good Judge Be a Good Politician?*, *supra* at 490, that the States have

struggled to eliminate since adopting judicial elections in the mid-nineteenth century.

They also demonstrate that disqualification and recusal are not adequate substitutes for direct solicitation rules. Disqualification and recusal are litigation-specific rules that address issues of bias piecemeal once "a proceeding" is initiated. *See, e.g.*, Fla. Code of Jud. Conduct, Canon 3(E)(1). But they do not address the probability of bias arising outside of discrete cases, and they do not address the corrosive, systemic effects that direct solicitation has on the public's confidence in the judiciary in general.

In fact, disqualification and recusal *exacerbate* the very problems direct solicitation rules guard against. As the *Caperton* opinions acknowledge, public confidence in the judiciary may be eroded by *either* the appearance that judges are biased, *see* 556 U.S. at 881–82 (maj. op.), or through "*allegations* that judges are biased, however groundless those charges may be," *see id.* at 891 (Roberts, C.J., dissenting) (emphasis added). Thus, by curtailing such ad-hoc accusations of bias before they can arise, direct solicitation rules not only enhance the appearance of impartiality before litigation begins, but they also reduce the incidence of *disqualification and recusal*, which themselves can "bring our judicial system into undeserved disrepute" *after* litigation begins. *See id.* at 902 (Roberts, C.J., dissenting).

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Supreme Court of Florida.

Respectfully submitted,

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DECEMBER 22, 2014

AMICUS CURIAE BRIEF

No. 13-1499

In The
Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF *AMICI CURIAE* STATE AND LOCAL JUDICIAL REFORM GROUPS IN SUPPORT OF RESPONDENT

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae respectfully submit this brief to the Court to demonstrate and explain how rules similar to Canon 7(C)(1) of the Florida Code of Judicial Conduct promote public confidence in the judiciaries of the states in which *amici* work. The *amici* signatories to this brief are nonpartisan state and local organizations committed to creating and maintaining an ethical judicial system and promoting public confidence in that system. While recognizing that a system of privately-financed judicial elections is not the optimal system for selecting judges, *amici* believe that, as long as such a system exists, it should minimize the appearance of contributors' influence on judicial decisions to the greatest extent possible. A brief description of each *amicus* organization follows.

Chicago Appleseed Fund for Justice is a nonpartisan research and advocacy organization that seeks to identify injustices, conduct research necessary to develop proposed solutions, and then advocate for their implementation. Using a combination of legal research, law practice, and social science research methods, the Chicago Appleseed Fund for Justice collects best practices, assesses the situation

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[1] This *amici curiae* brief is filed with the written consent of the parties. Neither a party nor a party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person has contributed money that was intended to fund preparing or submitting this brief.

locally, and proposes solutions tailored to Cook County. Much of the work involves making the courts fairer, as well as more accessible, efficient, and effective. Chicago Appleseed Fund for Justice has administered a Judicial Performance Commission pilot project in Cook County and engaged with the Illinois Supreme Court on issues of judicial elections and recusal in recent years.

Chicago Council of Lawyers is the only public interest bar association in Cook County. Established in 1969 by a group of lawyers who believed that lawyers had obligations beyond those of other professions, it is dedicated to improving the quality of justice in the legal system by advocating for fair and efficient administration of justice. The Chicago Council of Lawyers works for effectiveness, accountability, and equity in the law so that everyone has an equal chance for justice. The Chicago Appleseed Fund for Justice and Chicago Council of Lawyers work together in the Collaboration for Justice, focusing on the areas of courts' administration efficiency (including judicial performance, election, and ethics issues), as well criminal courts reform, domestic relations and community court reforms, and immigration court reform. The Chicago Council of Lawyers works independently of Chicago Appleseed in its efforts to evaluate judges for the purpose of educating voters.

The **Coalition for Impartial Justice** is a broad-based, nonpartisan organization advocating for a constitutional ballot question that allows voters the opportunity to decide how they would like to select

and retain judges in Minnesota. The reforms specifically call for public performance evaluations of judges, merit selection, as well as retention elections. The coalition includes over 30 member organizations that represent business, labor, religious, and other nonprofit organizations.

The **Fund for Modern Courts** ("FMC") is a private, nonprofit, nonpartisan organization dedicated to improving the administration of justice in New York State through advocacy, public education, and in-court programming, which includes an active court-monitoring program. FMC's board of directors includes concerned citizens of New York, faculty members at New York law schools, and attorneys practicing in New York courts. Founded in 1955, FMC is the only organization in New York State devoted exclusively to improving the judicial system. FMC has played a role in almost every significant judicial reform effort in New York State in the last sixty years. In the 1970s, FMC was instrumental in amending the New York Constitution to establish a commission-based appointive system for choosing the judges on New York's highest court, the Court of Appeals. More recently, members of FMC have provided testimony in legislative hearings on judicial selection, and to the recent Commission to Promote Public Confidence in Judicial Elections. FMC also has issued reports on judicial selection processes, including on New York's judicial elections. FMC's mission includes ensuring that the New York judiciary enjoys the public's confidence.

FMC, in April 2010, released a report titled, "A Heightened Recusal Standard for Elected New York Judges Presiding over Cases, Motions or Other Proceedings Involving Their Campaign Contributors," which recommended that the Administrative Board of the Courts establish a per se rule which would obligate judges to recuse themselves from hearing cases in which any party has made total contributions to the judge above a certain limited amount. Ultimately, the Administrative Board adopted Section 151 of the New York Rules of the Chief Administrative Judge – a "non-assignment of cases" rule for elected judges who received campaign contributions from parties before them, which accomplished the FMC's goal.

Justice Not Politics ("JNP") is Iowa's leading statewide coalition guarding against the politicization of Iowa's judicial system. JNP was formed in 2010 to protect Iowa's courts from the attacks by special interest groups, which waged a successful campaign against the retention of three Supreme Court justices because of the court's decision on marriage equality. JNP led the successful effort in 2012 to protect a fourth Supreme Court justice who was targeted by the religious right. The coalition boasts over 800 members, including 80 statewide and community organizations, and more than 10,000 followers on social media.

The **League of Women Voters of the United States** is a nonpartisan, community-based organization that encourages the informed and active participation of the citizens in government and influences

public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision-making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than three decades.

The **League of Women Voters of Florida** and its thirty local Leagues have long supported campaign finance reform and the independence of the judiciary.

The **Michigan Campaign Finance Network** ("MCFN") is a nonprofit, nonpartisan organization that conducts research and provides public education on money in Michigan politics. Throughout this century, MCFN has made research on state judicial election campaigns an area of emphasis.

The **Ohio Valley Environmental Coalition** ("OVEC") is a grassroots environmental organization located in Huntington, West Virginia, that was formed in 1987. While OVEC's primary mission is to preserve and protect the environment and communities in the region, since 1997, OVEC also has worked on campaign finance reform issues. OVEC has a special

interest in seeing that the judiciary is as impartial as possible because of the undue influence of the coal industry on election campaigns, especially the state supreme court. OVEC is also a founding member of West Virginian Citizens for Clean Elections.

Pennsylvanians for Modern Courts ("PMC") is a nonpartisan, nonprofit court reform organization dedicated to ensuring that all Pennsylvanians can come to court with confidence that they will be heard by qualified, fair, and impartial judges. PMC functions as a court watchdog, identifying and speaking out on issues that affect public confidence in our justice system. PMC's work focuses on three program issues: judicial selection reform, systemic court reform and improvements, and public education.

West Virginia Citizens for Clean Elections is a coalition of organizations (labor, environmental, policy advocacy, religious, etc.) seeking to promote election reforms in West Virginia, including public financing of state legislative and judicial elections. The coalition recognizes the substantial influence of political contributions on our state's public policy, and the need to give citizens a greater voice. West Virginia Citizens for Clean Elections was prominently involved in the effort to enact state legislation in 2010 that established the West Virginia Supreme Court Public Financing Pilot Project for 2012. This program provided a public financing option for candidates running for the two Supreme Court seats being contested in 2012.

The **West Virginia Citizen Action Group** ("WV-CAG") is a founding member of the West Virginia People's Election Reform Coalition and WV Citizens for Clean Elections. As a leader in these coalitions, WV-CAG has conducted research and issued reports on campaign contributions to state political campaigns. WV-CAG has been actively involved in efforts to establish a system of publicly financed elections in the state, as well as other campaign finance reform efforts. WV-CAG has advocated for better public policy, rights of individuals, a clean environment and a stronger democratic process since 1974. The philosophy of WV-CAG is that full-time citizen participation in the decision-making processes in our state is absolutely essential. WV-CAG's main goal is to increase the voice of the average citizen in public affairs.

The **Wisconsin Democracy Campaign** ("WDC") is a homegrown network of citizens fighting government corruption and working for fair elections, judicial integrity, media democracy, and open and transparent government. WDC pursues these objectives through research, citizen education, community outreach, coalition building, and direct advocacy. WDC was founded in 1995 as a nonprofit, independent coalition of individuals and groups responding to the growing dominance of special interest money in the campaigns of state lawmakers.

SUMMARY OF THE ARGUMENT

Amici write to demonstrate how rules similar to Canon 7(C)(1) promote public confidence in the judiciaries with which they have experience. Impartiality is uniquely important to the judicial branch and requires regulation of judges and judicial candidates that is not needed for the political branches.

Regulations similar to Canon 7(C)(1) serve an important purpose in the states in which *amici* do their work. As in the federal system, the function of state judicial branches of government is fundamentally different from the political branches. That difference justifies unique state regulation over the judiciary. Rather than animate or execute the public will, the judiciary often serves as a bulwark against it. Judges must enforce the law neutrally, and, to that end, there is a well-recognized public interest in an independent and impartial judiciary. There is also a public interest in maintaining the public's confidence in judicial independence and impartiality. Without the coercive and financial powers possessed by the political branches of government, the judiciary's legitimacy depends almost entirely on its reputation for fairness and the public's confidence in its impartiality and independence.

In the interest of building and protecting this reputation, many states, including those of *amici*, regulate judges and judicial elections differently than they do other public servants and elections in the political branches. For the sake of illustration, this *amici curiae* brief focuses on two specific states,

Pennsylvania and New York. In Pennsylvania and New York, as well as the other states in which *amici* function, these regulations include rules banning judges and judicial candidates from personally soliciting campaign contributions.

Pennsylvania's judicial experience demonstrates the importance of Pennsylvania Code of Judicial Conduct Rule 4.1(7).[2] In Pennsylvania, all judges are selected in partisan elections, the courts have experienced million-dollar elections since the late 1980s, and the state judicial branch has been plagued with ethical problems. This backdrop highlights the importance of Rule 4.1(7) in maintaining the public's confidence in the judiciary.

New York's experience with its similar rule, Section 100.5(A)(5),[3] has been equally positive. In the view of the FMC, the rule has prevented further erosion in public confidence in the judiciary related to privately-financed judicial elections and helped to ensure that the public continues to recognize judges – even elected ones – as fundamentally different from politicians. Section 100.5(A)(5) also prevents a number

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[2] Rule 4.1(7) provides: "A judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4." Pa. Code of Judicial Conduct, R. 4.1(7) (2014).

[3] Section 100.5(A)(5) provides: "A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate." N.Y. Rules of the Chief Admin. Judge § 100.5(A)(5).

of practical problems for judges that would arise if the State allowed for personal solicitation of campaign funds.

The states of *amici*, as demonstrated by the experiences of Pennsylvania and New York, are well-served by rules similar to Canon 7(C)(1).

ARGUMENT

I. Maintenance of the Appearance of Impartiality *is* Uniquely Important to the Judicial Branch of Government, and Requires Regulation of Judges and Judicial Candidates Not Needed for the Political Branches.

A. Judges Must Be Independent and Impartial.

As the sole non-political branch of government, the judiciary is uniquely expected to remain independent, operating under principles of impartiality and freedom from outside influence.[4] Politicians are elected to carry out the will of their constituents, and are not called upon to act as dispassionate, objective

[4] To distinguish the judiciary from the legislature as separate branches of government, Funds for Modern Courts ("FMC") in 2010 successfully advocated for the establishment of a Quadrennial Commission on Judicial Compensation to determine fair and equitable compensation for New York state judges and justices, breaking for the first time in decades the link between judicial and legislative salary increases.

arbiters of the law. Judges, by contrast, are tasked with serving as neutral decision-makers whose independence "may be an essential safeguard against the effects of occasional ill humors in the society." The Federalist No. 78, at 5 (Alexander Hamilton) (McLean's ed., 1788). In designing the independent judiciary, the Framers "believed the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and controversies." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 265-66 (1995) (Stevens, J., dissenting). Indeed, the independence of the judiciary is one of the most important bases for our system of separation of powers. *See* Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989).

B. The Public Must Have Confidence in Judges' Independence and Impartiality.

Judges must not only be independent and impartial in fact, but they must also *appear* to be so. It has often been noted that unlike the political branches, the judiciary has "neither FORCE nor WILL," The Federalist No. 78, at 1 (Alexander Hamilton), and so its legitimacy is uniquely tied to its public reputation. As this Court has observed: "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 817-18 (2002)

(Ginsburg, J., dissenting) ("[C]ourts control neither the purse nor the sword . . . their authority ultimately rests on public faith in those who don the robe."); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

The question of reputation does not only concern whether the public will accept judicial decisions or submit their disputes to the court; it reaches the judiciary's function directly. As Professor Briffault recognizes, an important argument in support of the canons is "for judges to take their role seriously and apply the law impartially, protect rights, and defend minorities, they need to enjoy a special degree of public respect." Richard Briffault, *New Issues in the Law of Democracy: Judicial Campaign Codes After* Republican Party of Minnesota v. White, 153 U. Pa. L. Rev. 181, 199 (2004). Without that respect, and the public confidence on which it is based, the judicial function itself risks breaking down.

C. Judges and Judicial Candidates Are Regulated to Protect the Judiciary's Competence, Independence, and Reputation.

This Court has made clear that "[a] State may . . . properly protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965). One of the ways states

do so is through special regulation of the conduct of judges and judicial candidates. Some of these regulations are broad standards. For example, in New York, judges are required to "respect and comply with the law and . . . act at all times in a manner that promotes public confidence and the integrity and impartiality of the judiciary." Rules of the Chief Admin. Judge § 100.2(A). Others reflect more specific limitations, such as New York's rule prohibiting most judges from serving "as an officer, director, manager, general partner, advisor, employee or other active participant of any business entity." *Id.* § 100.4(D)(3).

Notably, many of these regulations, which are unique to the judiciary and its function, would be at odds with the purpose and function of the political branches. For example, again in New York, to preserve the appearance of impartiality, judges are required to disqualify themselves from proceedings "in which the judge's impartiality might reasonably be questioned." *Id.* § 100.3(E). There is no comparable rule for state legislators, who are, of course, free (and expected) to introduce bills and vote on matters in which they have a non-financial interest. In addition, New York judges are not to be "swayed by partisan interests, public clamor or fear of criticism." *Id.* § 100.3(B)(1). Such a restriction on members of the political branches would be inconsistent with their roles in voicing and implementing the public's will; as would any regulation similar to New York's rule curtailing ex parte communications between judges

and parties with matters before them. *Cf. id.* § 100.3(B)(6).

Many states have also deemed it necessary to impose special regulations on judicial elections. These rules are consistent with the notion that some campaign activity that is proper in political-branch elections is inappropriate in judicial elections. Almost all states, for example, prohibit candidates from making pledges or promises of conduct if elected, other than the impartial performance of the office's duties. *See, e.g.*, Ill. Code of Judicial Conduct, Canon 7A(3)(d); Mich. Code of Judicial Conduct, Canon 7B(1)(c); Minn. Code of Judicial Conduct, Canon 4.1(A)(11); Kan. Code of Judicial Conduct, Canon 4.1(A)(6); Ark. Code of Judicial Conduct, Canon 4.1(A)(13); Tenn. Code of Judicial Conduct, Canon 4.1(A)(13). Most states also prevent judges and judicial candidates from engaging in partisan activity, such as making speeches on behalf of political organizations or publicly endorsing a candidate for public office. *See, e.g.*, Minn. Code of Judicial Conduct, Canon 4.1(A)(2)-(3); Kan. Code of Judicial Conduct, Canon 4.1(A)(1), (B)(2); Ark. Code of Judicial Conduct, Canon 4.1(A)(2)-(3); Tenn. Code of Judicial Conduct, Canon 4.1(A)(2)-(3).

New York likewise prohibits judges from making "pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office," or, "with respect to cases, controversies or issues that are likely to come before the court . . . commitments" that are inconsistent

with those duties. N.Y. Rules of the Chief Admin. Judge § 100.3(B)(9)(a)-(b). Pennsylvania has comparable prohibitions. *See* Pa. Code of Judicial Conduct, Canon 4.1(A)(11). Many states also prohibit judges and judicial candidates from making speeches on behalf of political organizations and the public endorsement of candidates for public office. *See, e.g.*, Iowa Code of Judicial Conduct, Canon 4.1(A)(2)-(3); N.Y. Rules of the Chief Admin. Judge § 100.5(A)(1)(e)-(f); Pa. Code of Judicial Conduct, Canon 4.1(A)(2)-(3); W. Va. Code of Judicial Conduct, Canon 5.1(A)(b)-(c).

II. The Experiences of Pennsylvania and New York.

Many states, including those in which *amici* function, also impose special regulations on fundraising for judicial elections, including bans on personal solicitation of campaign funds by judges and judicial candidates. Such regulations promote the public's confidence in the judiciaries of these states, as the experiences of Pennsylvania and New York amply show.

A. The Pennsylvania Experience.

As a state electing all its judges in partisan elections[5] in the oldest court system in the nation,

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[5] Pennsylvania judges for courts other than the state appellate courts can "cross-file" and be listed on both the Republican and Democratic primary ballots.

Pennsylvania presents a unique perspective on bans on personal solicitations of campaign funds. *See* Pa. Const. art. V § 13.

Pennsylvania's state court system dates back to the first supreme court created in 1684. Under the 1776 Pennsylvania Constitution, judges were appointed by the Executive Council for seven-year terms and eligible for reappointment at the end of each term. Pa. Const. of 1776, ch. II §§ 20, 23. Under the 1790 Constitution, judges were appointed by the governor and eligible to serve indefinitely, subject to good behavior. Pa. Const. of 1790, art. V § 2. In the 1830s, citizens were dissatisfied with what they deemed "excessive patronage" by the governor. Charles M. Snyder, *The Jacksonian Heritage Pennsylvania Politics 1833-1848*, 96 (1958). Then, in 1850, in conjunction with a nationwide movement attributable to both "Jacksonian Democracy" and a desire "to increase judicial independence and stature," Pennsylvanians instituted popular elections at all levels of the judiciary. Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 Williamette L. Rev. 1397, 1399-1400 (2003); Pa. Const. of 1838, art. V § 2.

Pennsylvania has had a fully elected judiciary that has now endured for 164 years. For a short time, judicial candidates were elected through nonpartisan ballots, but that law was repealed only eight years after it was enacted. *See* Darren M. Breslin, *Judicial Merit-Retention Elections in Pennsylvania*, 48 Duq. L. Rev. 891, 896 (Fall 2010). At the

1967-1968 Pennsylvania Constitutional Convention, the state constitution was amended to have partisan elections followed by nonpartisan merit retention elections for all trial and appellate judges. A ballot vote submitted to the citizens of Pennsylvania in 1969 as to whether appellate court judges should be selected by the governor from a list of names submitted by a judicial nominating commission failed by fewer than 20,000 votes. Robert E. Woodside, *Pennsylvania Constitutional Law* 558 (1985).

Judicial candidates in Pennsylvania may raise money only through the use of campaign committees. Pa. Code of Judicial Conduct, R. 4.1(7) (2014). These campaign committees provide an important buffer between the judicial candidates and their supporters which preserves the appearance of judicial impartiality and limits the appearance or actuality of either an express or implied *quid pro quo* expectation.

Pennsylvania utilizes a *laissez faire* campaign finance system with very few limits on donations, including for judicial elections. While most states did not see million-dollar elections for their high courts until 2000, Pennsylvania experienced them as early as 1989. Malia Reddick & James R. DeBuse, *Campaign Contributors and the Pennsylvania Supreme Court*, 93 Judicature 164 (2009-2010). "[A]verage citizens hardly ever give" to Pennsylvania judicial campaigns, with nearly 78% of donations being contributions of $250 or greater. James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 Judicature 10, 12-13 (2000-2001) ("Though a

number of better-off citizens could afford to give between $50 and $250, less than 20 percent of all funds came in this amount."). Additionally, the legal profession accounts for more than half of all money received. *Id.* at 12. Judicial campaign fundraising reached an all-time high in Pennsylvania in 2007, when general-election candidates for two supreme court seats brought in more than $7.75 million. Reddick & DeBuse, *supra*, at 164.

Between 2008 and 2009, 67% of the civil cases heard by the Pennsylvania Supreme Court involved at least one litigant, attorney, or firm that had donated to at least one justice. *Id.* at 164-65. In 46% of civil cases, a single litigant, attorney, or firm had contributed to at least four of the six justices who ran in contested elections. *Id.* at 165. Not surprisingly, 76% of Pennsylvanians believe that campaign contributions made to judges have a "great deal to some" influence on their decisions. Pennsylvanians for Modern Courts, *Poll Shows Pennsylvanians Favor Merit Selection for Appellate Courts* (2010), *available at* http://www.pmconline.org/files/one%20pager%20on%20poll_0.pdf.

Thus, based simply on the frequency with which contributors to the justices' election campaigns later appear before them, citizens and litigants already have a legitimate reason to question the fairness and impartiality of the court's decisions. This concern is heightened at present because in the fall of 2015, three seats will be vacant and available on the state supreme court, the largest number ever at stake in

one election. The strictly partisan election is already drawing speculation as to the influence of out-of-state interests and special-interest spending. *See, e.g.*, James P. O'Toole, *State Supreme Court Races Will Sizzle in 2015*, Pittsburgh Post-Gazette, Dec. 7, 2014.

Pennsylvania also has had ethical issues plaguing its courts, demonstrating its need to maintain and restore public confidence in the system. In the last two years, one state supreme court justice was convicted for public corruption for using state-paid lower court staffers to work on her supreme court campaigns. Another justice was suspended and thereafter resigned after disclosure that he sent and received sexually explicit e-mails through his state government account.

In September 2014, a Philadelphia municipal court judge pleaded guilty to federal mail and wire fraud charges resulting from helping a political donor who was a defendant in a lawsuit by calling other judges, seeking favorable treatment for the donor. The conviction was also based on a Federal Bureau of Investigation sting operation where the judge received $1,000 cash from a witness interested in a fictitious gun possession case to help the judge pay down his campaign debt. After receiving another $1,000 cash donation from the witness, the judge told the witness to call him anytime for "[a]nything you need. Anything I can do to help you or anybody that you're interested in." The judge did not report either of these donations. P.J. D'Annunzio, *Former Phila.*

Judge Waters Pleads Guilty to Case-Fixing, Legal Intelligencer, Sept. 25, 2014.

Rule 4.1(7), which provides that "a judge or judicial candidate shall not . . . personally solicit . . . campaign contributions," serves as a barrier against further erosion of the public's confidence in the judiciary. The only reported violation of Rule 4.1(7) demonstrates the harm that would ensue if Rule 4.1(7) was not in place. In *In re Singletary*, 967 A.2d 1094 (Pa. 2009), a case upholding Pennsylvania's comparable canon, a traffic court judge attended a motorcycle club rally while campaigning for reelection during the primary. The judge personally solicited funds from the members in attendance, in violation of the canon, asking

> You're all going to help me out? . . . There's going to be a basket going around because I'm running for Traffic Court Judge, right, and I need some money. I got some stuff that I got to do, but if you all can give me twenty ($20) dollars you're going to need me in Traffic Court, am I right about that? . . . Now you all want me to get there, you're all going to need my hook-up, right?

Id. at 1096.[6]

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[6] The judge was later convicted of making false statements to the FBI regarding whether ticket fixing was occurring in traffic court. Gina Passarella, *Judge Denies Post-Trial Motions in Traffic Court Case*, Legal Intelligencer, Nov. 10, 2014.

In June 2014, the Supreme Court of Pennsylvania enacted a revised Code of Judicial Conduct. This revised Code was the result of two years of intensive study, including consideration of the rules regulating judicial candidate conduct. The provision prohibiting personal solicitation by judicial candidates was reaffirmed in the revised Code.

In Pennsylvania, Rule 4.1(7) is essential to maintaining the appearance, and reality, of an impartial judiciary and the public's confidence in that judiciary. Without the Rule, it is not difficult to imagine the resulting stain on the judiciary and appearance of impropriety calling into question the public's confidence in the judicial branch.

B. The New York Experience

Section 100.5(A)(5) of the New York Rules of the Chief Administrative Judge provides in relevant part: "A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions." The rule reflects the State's determination that the appearance of a judge or judicial candidate personally soliciting money is incompatible with the standard of an impartial and independent decision-maker, and helps to maintain in the eyes of New Yorkers the important distinction between politicians and judges.

This rule operates against a context in which New Yorkers, like residents of other states, already hold a negative perception of the role private campaign

donations play in the judicial process. Specifically, the Marist College Institute for Public Opinion found that "[e]ighty-three percent of registered voters in the state indicate[d] that having to raise money for election campaigns has at least some influence on the decisions made by judges." Commission to Promote Public Confidence in Judicial Elections, *Public Opinion and Judicial Elections: A Survey of New York State Registered Voters*, 14 (2003).

These results track those of other studies. In addition to the Pennsylvania poll discussed above, a national survey found that seventy-six percent of those polled said that they think campaign contributions to judges have either some or a great deal of influence on the judges' decisions. Justice at Stake, *Frequency Questionnaire*, 4 (2001). And a 2007 poll by Zogby International found that seventy-nine percent of American business leaders thought that campaign contributions made to judges had some or a great deal of influence on those judges' decisions. Zogby International, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges*, 4. From a controlled experiment conducted on a representative sample of Kentuckians, researchers found that, where participants were told that contributions to state supreme court candidates were made by those with direct business before the court, only forty-seven percent of those surveyed believed that the judge could be fair. *See* James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy*

Theory and "New-Style" Judicial Campaigns, 102 Am. Pol. Sci. Rev. 59, 69 (2008). Even when they were told that the contributions were made by interest groups without direct business before the judge, still only slightly more than fifty-seven percent believed the judge could be fair. *Id.*

Section 100.5(A)(5) thus promotes the public's confidence in the independence and impartiality of the judiciary. Without that Section, New Yorkers' perception that money is undermining the independence of the judiciary would likely increase. If campaign contributions generally are believed to imperil the independence of judicial candidates,[7] personal solicitation of those contributions is likely to only increase those concerns. As Professor Briffault explains:

> [P]ersonal solicitation highlights the dangers of abuse by focusing on the potentially coercive nature of the request for contributions aimed at the potential donor who has or is

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[7] It is not only the New York public that recognizes the potential for actual and apparent corruption inherent in campaign contributions. The Court has recognized this potential on numerous occasions. *See, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) (recognizing "a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors"); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

> likely to have business before the judge seeking the contribution. Personal solicitation, thus, particularly threatens the appearance of impropriety and undermines the appearance of evenhanded treatment essential to the judicial role.

Briffault, *supra*, at 225. Courts have agreed. *See, e.g.*, *Siefert v. Alexander*, 608 F.3d 974, 989-90 (7th Cir. 2010) (observing that "the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means"); *In re Fadeley*, 310 Or. 548, 563 (1990) ("A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so."); *Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa.*, 944 F.2d 137, 142 (3d Cir. 1991) (remarking, "we cannot say that the state may not draw a line at the point where the coercive effect [of the raising of campaign funds], or its appearance, is at its most intense – personal solicitation by the candidate").

Personal solicitation of contributions by judges would also risk undermining the critical distinction between judges and politicians. If judges raise campaign funds in the same way as do politicians, judges are more likely to be thought of by the public as politicians and enjoy less of the "special degree of public respect" that they require to do their jobs well. *See* Briffault *supra*, 199; *cf.* Justice Sandra Day O'Connor, Remarks at Elmhurst College (May 30, 2013) (regretting the fact "there are many who think

of judges as politicians in robes" and that "[i]n many states, that's what they are").

In New York, a lack of public confidence in the impartiality and independence of certain judges would risk undermining the public's confidence in the entire judiciary, not just in specific judges, or even just elected judges. The Commission to Promote Public Confidence in Judicial Elections found that New Yorkers are relatively uninformed about their judiciary. Commission to Promote Public Confidence in Judicial Elections, *Judicial Elections Report*, 38 (2006). In this context, New Yorkers are likely to generalize, attributing the conduct of some judges to all judges. This was the case in Kentucky, where researchers found that, "[p]erhaps reflecting some degree of cynicism, roughly one-third of respondents who were told that the judge rejected campaign contributions nonetheless were certain to some degree that he in fact had received them." Gibson, *supra*, at 66. Further complicating matters is the fact that New York employs a mixed system of judicial selection, in which some judges are elected and others are appointed. The appearance of bias arising from judicial elections threatens to permeate the entire system, tainting the elected and appointed alike.

New York's recusal rules would provide no adequate substitute for Section 100.5(A)(5). Although a judge is required to recuse herself under a variety of different circumstances – most notably when "the judge's impartiality may reasonably be questioned," Rules of the Chief Admin. Judge § 100.3(E) – the

rules are primarily designed to combat the perception of bias in eyes of the *parties* to that dispute, not the public at large, who are not made aware of the recusal. The recusal rules thus do not aim to address the issues that Section 100.5(A)(5) address regarding the critical importance of the public's perception of the impartiality of the judiciary.

Finally, in New York, allowing judges and judicial candidates to personally solicit contributions would likely have negative practical consequences, essentially forcing all judicial candidates to personally solicit campaign funds regardless of their comfort with the practice and disadvantaging incumbent judges. As is the case with respect to the political branches of government, if personal solicitation were permitted, there is good reason to believe it would soon become the dominant and unavoidable campaign fundraising model. The pressure to personally solicit campaign funds would quickly become substantial because the practice would surely raise more money, and those who declined to do so would therefore render themselves electorally uncompetitive. In this "race to the bottom," even those judicial candidates who are opposed to or uncomfortable with personal solicitation would likely have no choice to but engage in the practice if they are to remain electorally competitive.

Incumbents could find themselves at a substantial disadvantage. The practice would require individual judges themselves to dedicate substantial time to personally fundraising, which would have to be

balanced with already busy dockets and heavy case workloads. In addition, Part 151 of New York's Rules of the Chief Administrator restricts the assignment of cases to judges where a party, counsel, or counsel's firm made campaign contributions of $2,500 or more to the judge during a given period. § 151.1. Incumbents with large dockets would need to spend substantial time and effort determining from whom they could properly solicit contributions and, inevitably, would have access to a smaller pool of contributors from which to draw. None of these increased burdens on sitting judges, or disadvantages in contested elections, is reasonable or justified.

CONCLUSION

The canons in the states of *amici* help maintain public confidence in these states' judiciaries, which is essential to the effective functioning of the judicial branch. Impartiality, and the appearance of impartiality, are uniquely important to the judicial branch and require regulation of judges and judicial candidates that is not needed for the two political branches. This case presents an important issue, the outcome of which will impact states throughout the country that have found rules like Canon 7(C)(1)

to be important tools for promoting the public's confidence in that judiciary.

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AMICUS CURIAE BRIEF

No. 13-1499

In the

SUPREME COURT OF THE UNITED STATES

LANELL WILLIAMS-YULEE,
PETITIONER,

v.

THE FLORIDA BAR,
RESPONDENT.

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

Speech in the context of electoral contests receives the greatest protection under the First Amendment. No restriction can stand unless it is narrowly tailored to serve a compelling state interest. Canon 7(C)(1) does not serve a compelling state interest because the state does not have a compelling interest in preventing the mere appearance of potential for bias as distinct from preventing a high probability of actual bias. Although this case presents a number of additional issues, *amicus curiae* believes it can best serve this Court by focusing solely on whether the government's alleged interest is sufficient to warrant restrictions on a category of speech for which First Amendment protections are at their "zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

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[1] This *amicus curiae* brief is filed with the written consent of the parties. Neither party nor party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting this brief.

Recognizing a compelling interest in preventing the mere appearance of potential for bias as distinct from preventing a high probability of actual bias would be inconsistent with this Court's cases regarding core political speech in the context of campaigns. It also would be inconsistent with this Court's rejection of speculative interests as a basis for restricting core political speech. This Court has consistently demanded that a state's interest must be concrete and not speculative to warrant restrictions on core political speech.

Furthermore, the decision to select judges through popular electoral contest demonstrates that the state does not have a compelling interest in preventing the mere appearance of potential for bias because it has voluntarily chosen a process that necessarily entails voters aligning themselves with or against the judicial candidate and with judges and judicial candidates seeking public favor.

Finally, recognizing a compelling interest in preventing the mere appearance of judicial bias as distinct from preventing a high probability of actual bias would invite restrictions on judges' roles in the community.

ARGUMENT

I. An Interest in Preventing the Mere Appearance of Potential for Bias as Distinct From Preventing a High Probability of Actual Bias is Too Speculative to Warrant Restrictions on Core Political Speech

Recognizing a compelling interest in preventing the mere appearance of potential for bias in the absence of a high probability of actual bias would be inconsistent with this Court's cases regarding speech in the context of political campaigns. It would open the door to restrictions on core political speech based on the "general gratitude" candidates for elective office feel toward their supporters, which this Court has rejected as too speculative to warrant restrictions on speech. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

The principle that no restriction on speech may survive strict scrutiny unless the interest it serves is to prevent a concrete as opposed to speculative harm animates this Court's First Amendment jurisprudence in other areas as well. For example, in the defamation context, this Court has curtailed the recovery of presumed damages, holding that "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Just as the substantial interest in the public figure defamation context is limited to preventing actual injury as opposed to presumed damages, so too is the substantial interest in the judicial campaign context limited to preventing a high probability of bias as opposed to the mere appearance of the potential for bias. In both contexts, the First Amendment requires us to "err on the side of protecting political speech rather than suppressing it." *McCutcheon*, 134 S. Ct. at 1451. Accordingly, laws restricting speech in the context of judicial elections should reach no farther than is necessary to prevent the high probability of actual bias. A law that serves

only the lesser interest in preventing the mere appearance of the potential for bias is too speculative to warrant curtailment of core political speech.

In the context of judicial elections, this Court has affirmed a litigant's due process right to a judge free from an intolerably high "probability of actual bias" resulting from an opposing party's substantial financial support of the judge's election campaign. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877–78, 884 (2009). However, preventing the mere appearance of the potential for bias is unnecessary to safeguard due process. *Id.* at 883. Indeed, if the contrary were true, judicial elections would be untenable because a litigant's due process rights would be violated whenever anyone known to have politically supported the judge's election campaign had any interest in the outcome of a case.

It bears noting that states may, without curtailing speech, still serve their lesser interest in preventing the mere appearance of the potential for bias by adopting "recusal standards more rigorous than due process requires, and censur[ing] judges who violate these standards." *Republican Party of Minnesota v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring); *see also Geary v. Renne*, 911 F.2d 280, 294 (9th Cir. 1990) (Reinhardt, J. concurring) ("[I]f [the state] wants to elect its judges, it cannot deprive its citizens of a full and robust election debate.").

II. A State's Decision to Select Its Judges Through Electoral Contests Demonstrates That it Does Not Have a Compelling Interest in Preventing the Mere Appearance of Potential for Bias

As Justice O'Connor observed, "[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges." *White*, 536 U.S. at 792 (O'Connor, J., concurring); *see also Family Trust Found. of Kentucky, Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004) (observing that "the very practice of electing judges undermines the state's interest in an actual and perceived impartial judiciary"). By forcing judges to run for their seats, the state requires candidates to cull favor, which gives rise to perceptions of bias. *See White*, 536 U.S. at 789 (O'Connor, J., concurring) ("Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so."). At a minimum, this Court should cast a skeptical eye on a state's claim to a compelling interest in preventing the mere appearance of the potential for bias if the state itself has undermined the public's confidence in the impartiality of judges by choosing to select them through popular election.

III. Recognizing a Compelling Interest in Preventing the Mere Appearance of Potential for Bias Would Diminish Judges' Roles in the Community

This Court has recognized that judges, like other officials, play important roles in our society, which "makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *White*, 536 U.S. at 781–82 (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)). Judges are increasingly giving talks, writing books, and educating on matters of public importance. Because any participation by judges in public life that deviates from a perfectly cloistered judiciary could affect the public's views on the impartiality of judges, recognizing a compelling state interest in preventing the mere appearance of the potential for bias would invite all manner of restrictions on speech in the public forum by judges and judicial candidates. Such state-directed disengagement from public discourse is antithetical to the First Amendment.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests this Court reject any contention that the state has a compelling interest in preventing the mere appearance of the potential for judicial bias sufficient to warrant restrictions on core political speech.

Respectfully submitted,

/s/ J. Joshua Wheeler

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AMICUS CURIAE BRIEF

No. 13-1499

In The
Supreme Court of the United States

LANELL WILLIAMS-YULEE, *Petitioner,*
v.
FLORIDA STATE BAR, *Respondent.*

On Writ of Certiorari to the Supreme Court of Florida

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November 24, 2014

Question Presented

1. Whether Florida's personal solicitation clause violates the First Amendment.

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Statement of Interest[1]

Amici are Mr. Randolph Wolfson, Mr. Marcus Carey, Mr. Gregory Wersal, the Honorable David Certo, the Honorable John Siefert, and the Honorable Erik Yost.

Mr. Wolfson is an Arizona attorney that has run for Justice of the Peace (2006) and Superior Court Judge (2008) in Mohave County, Arizona. He successfully challenged that state's endorsement and personal solicitation clauses, *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014), but that decision has been vacated pending en banc review. *Wolfson v. Concannon*, 768 F.3d 999 (9th Cir. 2014). That review is stayed pending this Court's decision in this case.

Mr. Carey is a Kentucky attorney who ran twice for judgeship: first, for Kentucky Supreme Court, second, for trial court. He successfully challenged Kentucky's personal solicitation clause. *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010).

Mr. Wersal is a Minnesota attorney who has run several judicial campaigns for that state's Supreme Court. He successfully challenged Minnesota's announce clause in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and its party affiliation

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[1]No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties' counsel of record received timely notice of Amici's intent to file this brief pursuant to Rule 37(a) and have consented to its filing.

clause and prior personal solicitation clause in *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005), but was unsuccessful in his challenge to Minnesota's revised personal solicitation clause and its endorsement clause. *Wersal v. Sexton*, 674 F.3d 1010 (8th Cir. 2012) (en banc).

Judge Certo serves as a Marion County Superior Court judge in Indianapolis, Indiana. He unsuccessfully challenged numerous judicial candidate speech regulations, including Indiana's personal solicitation clause. *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010).

Judge Siefert currently serves as a Milwaukee County Circuit Court judge in Wisconsin. He unsuccessfully challenged Wisconsin's personal solicitation clause and endorsement clause. *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010).

Judge Yost currently serves as a district court judge in Sedgwick County, Kansas. He successfully challenged Kansas' personal solicitation clause. *Yost v. Stout*, No. 06-4122-JAR, 2008 WL 8906379, at *11 (D. Kansas 2008).

Also an amicus is the James Madison Center for Free Speech ("Madison Center"). The Madison Center is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election-law cases, including the challenges to the Bipartisan Campaign Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*

II"). The mission of the Madison Center is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." *New York Times v. Sullivan*, 376 U.S. 254, 275 (1964). The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation.

Summary of Argument

This case turns on the level of scrutiny applicable to the personal solicitation clause and the nature of and its tailoring to the state's compelling interest.

Like the announce clause in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the personal solicitation clause regulates core political speech, so it too is subject to strict scrutiny, regardless of whether it applies to judge nor non-judge candidates. Accordingly, the clause must be narrowly tailored to serve a compelling state interest.

The state's only compelling interest is that of impartiality and its appearance. This Court in *White* defined impartiality as preventing bias for or against a party—that is, ensuring due process is afforded to litigants. Impartiality defined as openmindedness is not a compelling interest because its threshold is too

low to be regulable and because openmindedness is not always desirable. Any judicial campaign speech regulation that seeks to prevent the appearance of bias for or against a party must be tailored to prevent actual partiality or run the risk of undermining due process by masking actual partiality for the sake of appearances.

The government cannot justify judicial campaign speech regulations as efforts to protect judicial independence and public confidence. Such an interest is already served through the judicial system itself, which directs judges to follow existing law, allows them to make new law, and ensures these principles are adhered to through judicial elections.

Nor can the government justify judicial campaign speech regulations by asserting a generalized interest in preventing the appearance of impropriety. No longer tied to due process, such an interest turns simply on abstract public perceptions rather than a legitimate, empirical threats to justice. First Amendment rights cannot be subverted simply to accommodate the ever-changing views of the public.

Last, the government's interest in preventing coercion is already served through statutes that prohibit all public officials from engaging in such conduct. Judicial campaign regulations seeking to do the same are unnecessary.

With a recognized government interest in preventing impartiality, the burden still remains on the government to demonstrate that judicial speech regulations like the personal solicitation clause are narrowly tailored. Simply asking for funds, whether by

letter or in person, cannot, without more, implicate partiality.

This is because the source of potential bias is in knowing the source and amount of contributions, not in the "ask." If the laws governing these sources of bias are inadequate, the solution is not to implement another prophylactic layer of regulation. Instead, contribution limitations and source disclosures should be revisited.

Certain solicitations do implicate impartiality concerns. Solicitations from the bench or anywhere else in a building that houses a judge's chambers creates a strong threat to impartiality or its appearance. So do solicitations of—and indeed, receiving money from—litigants and attorneys with cases pending before judges. Regulations tailored to these concerns would be constitutional. But in those rare circumstances where other threats to impartiality exist, recusal is the best, least restrictive means for addressing those concerns.

Argument

Soliciting contributions is an essential part of any election campaign. As observed in *Republican Party of Minnesota v. White* 536 U.S. 765 (2002), "[u]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising." *Id.* at 789 (O'Connor, J. concurring). This essential campaign function is also core political speech. So regulations affecting it are prohibited unless narrowly tailored to serve a compelling state interest.

I. Strict Scrutiny Applies.

A. The Personal Solicitation Clause Regulates Core Political Speech.

Political speech traditionally enjoys the greatest constitutional protection under the First Amendment of the United States Constitution, with restrictions on it subject to strict scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 15 (1976).[2] In *White*, this Court reviewed Minnesota's announce clause, which prohibited judicial candidates from stating their views on disputed legal and political issues, and applied strict scrutiny to it, recognizing that the clause "both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." 536 U.S. at 774.[3]

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[2]Indeed, this Court has consistently held that content-based speech regulations—whether political or not—are subject to strict scrutiny. *See, e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Rosenberger v. Rector*, 515 U.S. 819, 828-29 (1995).

[3]That differences exist between judicial and legislative office does not mean such speech is entitled to less constitutional protection during election campaigns. Instead, such differences, insofar as they are relevant, are accounted for in the interests this Court recognizes as compelling. In *White*, this Court held that since due process concerns are uniquely applicable in the judicial speech context, a distinctly judicial compelling interest in preserving impartiality exists. *White*, 536 U.S. at 775-76. So it afforded the government an opportunity to specifically demonstrate that the law serves and is narrowly tailored to that interest. *Id.*

The personal solicitation clause, which prohibits judicial candidates from "personally solicit[ing] campaign funds, or solicit[ing] attorneys for publicly stated support," Fla. Canon Jud. Conduct 7C(1), is likewise tied to the content of speech. For example, candidates may not ask for support in some ways (campaign funds) but may in others (a vote, yard signs). *See Carey v. Wolnitzek*, 614 F.3d 189, 199 (6th Cir. 2010). So the clause should be subject to strict scrutiny review.[4]

That personal solicitations can result in a contribution does not change this analysis. In *Buckley*, this Court held that contribution limits are subject to less rigorous scrutiny than spending restrictions. 424 U.S. at 25. Contributions can be limited, provided they are not too low, *Randall v. Sorrell*, 548 U.S. 230, 232 (2006), and are reasonably and narrowly tailored to serve a sufficiently important interest. *McCutcheon v. FEC*, 134 S.Ct. 1434, 1456-57 (2014). However, the personal solicitation clause limits speech, not contributions, based on the topic and the speaker. *Compare* Fla. Canon Jud. Conduct 7C(1) *with* Fla. Stat. 106.08(1)(a) (imposing $3,000 contribution limits on state supreme court candidates and $1,000 contribution limits for all

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at 774-75.

[4]Every Circuit to address the constitutionality of speech bans in judicial canons or rules, with the lone exception of the Seventh, agrees. *See Wersal v. Sexton*, 674 F.3d 1010 (8th Cir. 2012) (en banc); *Carey*, 614 F.3d at 199; *Republican Party of Minnesota v. White*, 416 F.3d 738, 775 (8th Cir. 2005) ("*White II*"); *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002); *Stretton v. Disciplinary Board of Pennsylvania*, 944 F.2d 137, 141 (3rd Cir. 1991).

other judicial offices). Strict scrutiny review is the proper standard.

B. Strict Scrutiny Applies Regardless of The Speaker.

The Seventh Circuit has subjected regulations of judges' campaign speech to lesser scrutiny review. *See Siefert v. Alexander*, 608 F.3d 974, 984 (7th Cir. 2010) (applying a balancing test); *Bauer v. Shepard*, 620 F.3d 704, 713 (7th Cir. 2010) (same); *see also Wolfson v. Concannon*, 750 F.3d 1145, 1161 (9th Cir. 2014) (Berzon, J., concurring) (vacated for en banc review) (limiting its strict scrutiny analysis to only nonjudge judicial candidates). This is improper.

This Court established a balancing test to review government employee speech regulations, reasoning that, when public employees are engaged in their official duties, they are not acting as citizens and so their speech is not protected by the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Instead, their speech rights are balanced against the state's interest in performing its important governmental function. *Id.* at 420. Thus the district attorney in *Garcetti* who, during the exercise of his duties, wrote a disposition memo advising his superior on a course of action could legitimately be disciplined for the content of the memo.

However, the this Court has also held that the state cannot force an employee to relinquish her constitutional rights as a citizen in order to secure public employment. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). For example, teachers cannot be dismissed because of speech they engaged in outside of

their employment, absent a showing of defamation or other constitutionally-recognized exception. *Id.* at 574.

Indeed, the *Letter Carriers* decision, which addressed the Hatch Act's political speech restriction on government employees, was directed toward "protect[ing] employees' rights, notably their right to free expression," *United States v. National Treasury Employees Union*, 513 U.S. 454, 471 (1976), by preventing ranking officials from making "advancement in the Government service . . . depend on political performance." *CSC v. Letter Carriers*, 413 U.S. 548, 566 (1973); *see also Elrod v. Burns*, 427 U.S. 437, 366-67 (1976).

None of these cases stand for the proposition that elected officials' speech, including judicial candidates' speech, can likewise be restricted. It is one thing to regulate the speech of unelected public employees who only answer to the government as their employer; it is quite another to regulate the campaign speech of public officials, who are required to stand for election and who are beholden to the public at large.

Indeed, the fundamental purpose of the First Amendment's speech clause is to protect political speakers during campaigns: "'The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *White*, 536 U.S. at 781 (*quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222-223 (1989)). So "'[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'"

White, 536 U.S. at 788 (*quoting Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). A regulation prohibiting a sitting judge that is required to run for office from asking for funds implicates the First Amendment with equal force as it would a non-judge judicial candidate asking for funds.

But even if the government employee cases were not exclusively directed at the peculiarities of unelected government employees and even if such cases applied more broadly to a state interest in preserving government function,[5] the personal solicitation clause presents another problem: It's not tailored with that distinction in mind, but applies to all judicial candidates, whether incumbent or challenger. At most, the balancing test could apply only to judges' speech, effectively establishing two speech standards, depending on the speaker. *See Wolfson*, 750 F.3d at 1161 (Berzon, J., concurring) (vacated for en banc review).

But such discriminatory speech standards contravene this Court's holding in *Davis v. FEC*, 554 U.S. 724

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[5]Such a broad interest is problematic, particularly because the *White* Court struck down the announce clause, which could arguably have been crafted to assist the government "perform its functions." Moreover, the recognized "narrow class of speech restrictions" listed in *Citizens United* relate to speaker-discrimination that the Supreme Court has allowed in the context of education, prisons, military, and government employment qualifications. 558 U.S. 310, 341 (2010). The election process is not one of these government functions. Indeed, this Court expressly observed that regulations of speech during the political process and in the context of political speech may *not* impose restrictions on disfavored speakers. *Id.*

(2008), which unequivocally denounced asymmetrical campaign restrictions among competing candidates. *Id.* at 743-44 ("the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment."). A balancing test is thus not only inapplicable; it is unconstitutional. All judicial candidates' speech is equal under the First Amendment. Review of the constitutionality of its regulation should be as well. Strict scrutiny applies.

II. The Only Compelling Interest Is Preserving Impartiality or Its Appearance.

A. Impartiality Means Unbiased Toward A Party.

The *White* court recognized impartiality as a compelling interest. *White*, 536 U.S. at 776. In doing so, it considered three possible definitions of impartiality: impartiality as a lack of bias toward the parties, impartiality as a lack of preconceptions about legal issues, and impartiality as open-mindedness. *Id.* at 775-80.The Court held that preventing bias for or against a party was compelling because due process requires trial before an unbiased judge. *Id.* at 776. *See Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). The Court discarded a definition of "lack of preconceptions" because having a judge with no preconceptions on any legal issue is neither possible nor desirable. *Id.* at 777. *See Laird v. Tatum*, 409 U.S. 824, 835 (1972) ("Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualifications, not lack of bias"). But it left open the possibility of openmindedness as a compelling interest. *White*,

536 U.S. at 778.

This last proposed definition of impartiality requires of a judge "not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." *Id.* at 778. Judicial openmindedness "seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so." *Id.* (emphasis in original).

Openmindedness is not a meaningful threshold for regulating protected political speech. Preliminarily, the threshold for establishing openmindedness as set forth in *White* is so low that the circumstance is rare where the interest would be implicated. Contrary to the Arkansas Supreme Court's reasoning in *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 247 S.W.3d 876, 811 (2007), openmindedness does not preclude being predisposed toward an outcome, whether because the judge firmly believes it is the right one or because the party or party's counsel making the argument responded positively or negatively to a personal solicitation. A judge can be more inclined toward one outcome or skeptical of another for a host of reasons, but as long as she is willing to hear and consider the arguments offered—there is *some* chance of success—she will meet the *White* standard for openmindedness.

But more crucially, contexts exist in which openmindness is not desirable. It is not desirable for judges to entertain serious doubts as to whether conviction in a criminal case requires proof beyond a reasonable doubt, whether truth is a defense against a

claim for libel, or whether lower courts are bound to follow higher court precedent. At most, judges cannot be expected to do more than respectfully listen to parties arguments on these questions before ruling against them. *See* James Bopp, Jr. and Anita Y. Woudenberg, *An Announce Clause By Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves For Exercising Their Freedom to Speak*, 55 Drake. L. Rev. 723, 745-50 (2007). Bias toward parties is the sole impartiality interest of the government.

B. Preventing The Appearance of Bias Toward A Party Can Be Compelling.

The *White* decision found both impartiality and the appearance of impartiality to be compelling interests within the strict scrutiny analysis. *Id.* at 776, 778; *see Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009). This "appearance of partiality" concern, however, must be demonstrably tied to actual impartiality concerns to be compelling.

Strict scrutiny requires evidence of a "direct casual link" between the interest and the crafting of the law, and that there be an actual "problem that needs solving." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). As was the case in *Caperton*, the prevention of bias—whether actual or apparent—must always be tied to the facts surrounding the conduct and proceedings in question. *See Caperton*, 556 U.S. at 886 (assessing "the contribution's relative size," "the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election" to conclude a substantial risk of bias was present). States adopting a judicial election system do so know-

ing that such a system necessitates that judicial candidates behave as any other candidate would in running a campaign. So activities like personally asking for funds, which are standard operating procedures for campaigns, cannot, without more, be regulated simply because bias appears to be occurring in the abstract.[6]

Blanket regulation of judicial campaign speech without such factual support also creates the very real risk that actual partiality will be masked in the name of appearances, an outcome contrary to the government's interest in ensuring due process for litigants. For example, most states prohibit judicial candidates from themselves soliciting money but allow a committee to be established to do it for them. *See* Florida Canon Jud. Cond. 7C(1); ABA Model Code Jud. Cond. 4.4. Nothing in the rules governing such committees prohibits them from discussing with the judicial candidate who was asked, who said "yes" or "no," and thanking them for their support. *See Carey*, 614 F.3d at 205. So the committee, while giving the appearance of impartiality because technically the judicial candidate is not herself asking for money, actual serves simply to mask any actual bias that might—though not

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[6]As with actual impartiality, the regulation of the "appearance of impartiality" must be limited to preventing "bias for or against parties." *See supra* Part II.A. Otherwise, its scope turns away from due process toward assessing how the public generally perceives a judge's biases based on her speech during her campaign and could justify proscriptions on speech already struck down in *White*. *See Wersal*, 674 F.3d at 1032 (Loken, J., concurring); *id.* at 1044 (Beam, J., dissenting).

presumptively—occur. Due process is not only not served by such illusions of impartiality, it is undermined. The appearance of impartiality can only be a compelling interest in factually justifiable circumstances that do not undermine actual bias concerns.

C. A Generalized Interest In Preventing The Appearance of Impropriety Is Not Compelling.

The Florida Supreme Court's decision reflects renewed efforts to find compelling interests beyond those considered in *White* to justify regulations like the personal solicitation clause. One such interest is the appearance of impropriety. *The Florida Bar v. Williams-Yulee,* 138 So.3d 379, 384 (Fla. 2014) ("*Yulee*"); *see also Wersal*, 674 F.3d at 1025. No longer concerned about party bias in a particular case, the interest becomes about a judge's duty to "'maintain the dignity of judicial offices at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives.'" *Wersal*, 674 F.3d at 1023 (*quoting* 52 Minn. Stat. Ann., Code of Judicial Conduct, Preamble); *Yulee,* 138 So.3d at 384.

But with no identifiable judicial officer, no litigant or party, and no proceedings in particular, a "purported compelling interest based upon a public perception of bias is, at best, substantially underinclusive, contrafactual, generalized, speculative, presumptive, abstract and spun from the thinnest of constitutional gossamer." *Wersal*, 674 F.3d at 1048 (Beam, J., dissenting). Indeed, such analysis turns the *White* decision on its head.

White, at its most fundamental level, is a case

about reconciling Fourteenth Amendment due process rights on the one hand with First Amendment rights on the other. To addresses these interests within the strict scrutiny context, the *White* court recognized "bias for or against a party in a proceeding," as a compelling interest—certainly the Fourteenth Amendment's due process protections ought to serve as a compelling source of justification for a law. But it also required that interest be served in as narrow a way as possible—competing First Amendment rights necessitated it be so.

An "appearance of impropriety" interest releases the legal analysis from its due process moorings. It makes the interest a broadly public affair, governed by abstract notions of what the public might think about a judge or the judiciary in general without regard to whether the bias amounts to a credible threat to actual justice in an ongoing proceeding. And it relieves the state of its obligation to offer evidence to support its bias concerns. *See supra* Part II.B. It is not a compelling interest warranting subversion of First Amendment rights.

D. Judicial Independence And Public Confidence Are Not Compelling Interests For Regulating Campaign Speech.

The Eighth Circuit en banc decision also posits a separate and distinct compelling interest in "judicial independence." *Wersal*, 674F.3d at 1033 (Loken, J., concurring). "Although the phrase is hard to define, the term 'judicial independence' embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or

the latest opinion poll." Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes*, Ohio St. L. J. 3, 3 (2003). State supreme courts, including Florida, have asserted a similar interest in ensuring "public trust and confidence in the integrity of the judicial system." *Yulee*, at 384 (citing *Simes*, 247 S.W.3d at 881; *In re Dunleavy*, 838 A.2d 338, 351 (Me.2003); *In re Fadeley*, 802 P.2d 31, 41 (Ore. 1990)). These are necessary components of the American judicial system. But the system itself, not judicial speech bans, ensures these interests are served.

Judges have a dual role. First, they make law. *See White*, 536 U.S. at 784; *Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991) (discussing judges as policymakers); *see also* Benjamin Cardozo, *The Nature of the Judicial Process* 113-15 (1921). In creating the common law and policy, judges are legitimately influenced by their own views on policy in making that law. *See White*, 536 U.S. at 777-78 (discussing as appropriate that judges have preconceptions of what the law ought to be and how it works). Because of this legitimate role, it is also legitimate for the people to elect judges who reflect their values to such policy-making positions.

Second, judges are obligated to apply the facts and the law to the case before them. *White*, 536 U.S. at 799 (Breyer, J. dissenting). Judges must be independent of outside influences to allow them to honor this obligation. When they do not honor this obligation and issue rulings despite the facts and the law, it is then that judicial independence is threatened because in that context, they do not deserve the freedom such independence provides.

Because judges are expected to be judicially inde-

pendent, the voters must be sure that elected judges will honor the parameters that justify that independence. Broadly allowing the political speech freedoms the First Amendment envisions—including soliciting support through funding—helps ensure that. Indeed, "an enforced silence . . . would probably engender resentment, suspicion, and contempt [for the judiciary] much more than it would enhance respect." *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

Judicial elections are the means by which the people seek to ensure that judges stay within their proper bounds and to ensure that judges develop the common law in a manner consistent with the values of the people. To regulate judicial campaign speech to preserve judicial independence is antithetical to the very purpose of having judicial elections in the first place. Judicial independence and preserving the public's confidence in that judiciary are not compelling justifications for regulating judicial campaign speech.

E. Preventing Coercion Is Not A Compelling Interest.

The Florida Supreme Court suggests a coercion component to the government's appearance of impropriety concerns. *Yulee*, 138 So.3d at 384-85. It looks for support to the Arkansas Supreme Court, which asserts without evidence that "[a]llowing a judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court . . . inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate." *Simes*, 247 S.W.3d at 882. *See also Stretton*, 944 F.2d 137, 146 (3rd Cir. 1991)("we cannot say that the state may not draw a line at the

point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate."). The government certainly has a compelling interest in preventing actual coercion. But "[i]t is somewhat peculiar to say that *asking a question* is an evil requiring government intervention, particularly in the context of a campaign that requires such questions to be asked." *Siefert v. Alexander*, 597 F. Supp. 2d 860, 887 (W.D. Wis. 2009), *aff'd in part, rev'd in part*, 608 F.3d 974 (7th Cir. 2010) (emphasis in original). And in any event, other statutes address the problem in all campaign contexts. *See, e.g.*, Fla. Stat. § 112.313(2) ("No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer, employee, local government attorney, or candidate would be influenced thereby."); Fla. Stat. § 104.31 (prohibiting state officers and employees from "(a) Us[ing] his or her official authority or influence for the purpose of interfering with an election or a nomination of office or coercing or influencing another person's vote or affecting the result thereof" or "(b) Directly or indirectly coerc[ing] or attempt[ing] to coerce, command, or advise any other officer or employee to pay, lend, or contribute any part of his or her salary, or any money, or anything else of value to any party, committee, organization, agency, or person for political purposes.").

Moreover, there is nothing unique to a committee solicitation that avoids coercion in a way personal

solicitation does not:

> It may well be that a solicitee will perceive a solicitation to contribute to a judge's campaign to be a demand for a quid pro quo, especially where the solicitee has a case pending before the judge. However, that perception will not be appreciably diminished where the solicitation is made by the judge's agent instead of the judge.

Carey v. Wolnitzek, No. 3:06-cv-36, 2008 WL 4602786, at *16 (E.D. Ky. Oct. 15, 2008) *aff'd in part, vacated in part*, 614 F.3d 189 (6th Cir. 2010) (*citing* Sara Mathias, Am. Judicature Soc'y, *Electing Justice: A Handbook of Judicial Election Reforms* 47, 54 (1990), which described an "incident in which trial judge's campaign committee called President of Florida Bar Association one day before he was scheduled to appear before judge, thanking him for his endorsement but noting that no check was enclosed with letter.").

Preventing coercion is not a compelling justification for prophylaxis-on-prophylaxis judicial campaign speech bans like the personal solicitation clause.

III. Narrow Tailoring Is Required.

The American judicial system has traditionally granted judges a presumption of impartiality, which can be overcome only by objective evidence of actual bias. *See Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) ("[W]e accept the notion that the conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. The acquired skill and capacity to disre-

gard extraneous matters is one of the requisites of judicial office.") (internal citations and quotations omitted); *see also Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994) ("We expect–even demand–that judges rise above their potential biasing influences, and in most cases we presume judges do.") (citation omitted). So it is only proper that the government bears the burden of demonstrating narrow tailoring. *White*, 536 U.S. at 774-75.

A. Most Personal Solicitation Contexts Do Not Implicate Impartiality Concerns.

The personal solicitation clause bans *all* personal solicitations.[7] So although Mr. Wolfson wants to personally solicit campaign contributions at live appearances and speaking engagements, to make phone calls, and to sign his name to fund appeal letters in future campaigns, he is unable to do so. *Wolfson v. Brammer*, 616 F.3d 1045, 1052 (9th Cir. 2010). When Judge Certo wanted to personally solicit funds for his campaign from family members, former out-of-state roommates and classmates—none of whom would affect his ability to be impartial any more than he was already affected—he was unable to do so. *Bauer v. Shepard*, 634 F. Supp.2d 914, 923 (N.D. Ind. 2009). When Judge Siefert wanted to make personal phone calls asking for funds, to make personal invitations to

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[7]That a judge can form a committee does not negate this fact. Just as PACs formed by corporations are separate speakers and so have little relevance to regulations that impact a corporation's ability to itself speak, *see Citizens United v. FEC*, 558 U.S. 310, 337 (2010), so too do judicial committees formed by a judicial candidate.

potential donors to his campaign's fundraising events, and to sign letters seeking contributions to his upcoming 2011 election campaign, he was unable to do so. *Siefert v. Alexander*, 608 F.3d 974, 977 (7th Cir. 2010). And when Mr. Wersal wanted to personally solicit funds for his campaign from non-attorneys by going door-to-door and by making personal phone calls asking for financial support, he could not do so.[8] *Wersal v. Sexton*, 674 F.3d 1010, 1017 (8th Cir. 2012) (en banc). Yet without more to rest on factually, these circumstances do not implicate bias or appearance of bias concerns.

This is because the source of potential bias stems not from asking for funds but from the receipt of funds and knowledge of their source. The only way "mass mailings," for example, "raise[ ] an appearance of impropriety and call [ ] into question, in the public's mind, the judge's impartiality," *Yulee*, 138 So.3d at 385, is if a judge is presumed or is required to be monitoring how each and every mailer is responded to and decides to reward or punish those responding (if they ever even appear in court) according to that response (and the size of that response).

In Florida, the receipt of funds is governed by contribution limits. *See* Fla. Stat. 106.08(1)(a). And candidate monitoring of contributors and their contri-

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[8]Judge Yost and Mr. Carey successfully challenged Kansas' and Kentucky's personal solicitation clauses, respectively, and so are able to personal solicit for their campaigns. *See Yost v. Stout*, No. 06-4122-JAR, 2008 WL 8906379, at *11 (D. Kansas 2008); *Carey v. Wolnitzek*, 614 F.3d 189, 207 (6th Cir. 2010).

butions is required. *See* Fla. Stat. § 16.07(5) (requiring both a candidate and her treasurer to certify the correctness of reports filed with the state and subjecting the knowing certification of false, incorrect, or incomplete information to a criminal misdemeanor charge); Fla. Stat. § 106.07(4)(a)(1) (requiring contribution reports to include the full name, address, occupation of contributors along with the full amount and date of contribution). This is true in other states as well. *See, e.g.*, Ariz. Stat. § 16-913(I) (requiring all candidates, including judicial candidates, to either themselves or their treasurer to certify under penalty of perjury that reports filed with the state are true and complete); Ariz. Stat. § 16-904(E)(requiring a political committee to keep an account of "[t]he identification of any individual or political committee that makes any contribution together with the date and amount of each contribution and the date of deposit into a designated account.").

It is these provisions, not a personal solicitation ban, that properly targets actual bias sources, and so if these are inadequate, they should be revisited. The solution is not to adopt a sweeping prophylaxis-on-prophylaxis regulation. As such a regulation, the personal solicitation clause is subject to especially rigorous scrutiny review. *See McCutcheon v FEC*, 134 S. Ct. 1434, 1458 (2014); *cf. FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (discussing the Federal Election Commission's unconstitutional use of numerous regulations to get at the same corruption interest associated with political contributions). A complete ban on all personal solicitations inherently fails such scrutiny.

B. Narrow Circumstances for Prohibiting Personal Solicitation Exist.

1. Courthouse Solicitations Can Be Constitutionally Prohibited.

Soliciting contributions for a judicial candidate anywhere in a courthouse or building where a judge's chambers are located creates a legitimate appearance of bias. The odds of a party or a party's attorney being in the courthouse are substantial, making the threat to impartiality very real. This is true of any solicitations made by anyone of anyone, including by a committee member or of an attorney. And it is especially true of solicitations made by a judge from the bench of any courtroom.

This problem is not unique to the judiciary. Such an appearance of bias, whether for or against a litigant, a constituent, or an organization, can be created in *all* candidate contexts, not just judicial candidates. For this reason, federal law has properly made it "unlawful for any person to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States." 18 U.S.C. § 607(a)(1). Notably, this "time, place, or manner" restriction, *see City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994), applies to *all* solicitations, whether by a candidate or her committee. And it applies to all *receipts* as well—the risk of creating bias is just as great if a litigant of their own volition hands a judge a check as if the judge herself had sought out that contribution. So it exhibits narrow tailoring to

avoid under-and overinclusiveness in a way that the personal solicitation clause does not.

2. Soliciting Participants in Pending Litigation Can Be Constitutionally Prohibited.

Soliciting litigants with cases pending before an incumbent judicial candidate, or those litigants' attorneys, also poses a very real bias problem. Such a bias is not limited to a courthouse but is implicated in *any* context.

The *White* court acknowledged this problem in its review of the announce clause. In assessing the scope of the announce clause, the majority noted that it "covers much more than *promising to decide an issue a particular way*," calling its constitutionality into question. *White*, 536 U.S. at 770 (emphasis added). And in contrast, Justice Ginsberg reasoned in her dissent that the announce clause was constitutional because it prohibited judicial candidates not from "generally stating her view on legal questions," but from "publicly making known how she would *decide* disputed issues." *White*, 536 U.S. at 809 (internal citations omitted) (emphasis in original). Both rationales suggest a compelling interest exists for limiting judicial speech surrounding pending disputes in court. *See Carey*, 614 F.3d at 200.

Many states are aware of this concern and so include in their codes of judicial conduct prohibitions on publicly commenting on pending cases notwithstanding the views a judge may have on those cases. *See, e.g.*, Fla. Code Jud. Conduct 3B(9) ("A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness

or make any nonpublic comment that might substantially interfere with a fair trial or hearing."). *See also* ABA Model Code Rule 2.10(A) (stating that "[a] judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing").

A corollary concern exists in the context of personal solicitations. As Justice O'Connor observed in her concurrence in *White*, a large proportion of campaign funds often comes from those with pending cases, creating the very real threat of judicial bias or its appearance. *White*, 536 U.S. at 790. So while personal solicitations, like announcing one's views, cannot be broadly proscribed, compelling impartiality concerns justify prohibiting personal solicitations both by a judge or her committee of those involved in pending litigation, so long as it is coupled with a prohibition on the receipt of funds from those same potential donors. *See Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) ("Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support.").

C. Recusal Is The Better Alternative.

In all other cases aside from properly tailored prohibitions in the circumstances described above in Part B, the best, least restrictive means for ensuring due process and addressing impartiality concerns is recusal. As Part A shows, not every personal solicitation presumptively creates an partiality concern, *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2263 (2009), and so for those rare, factually unique cases

where it can legitimately be called into question, this Court has found recusal to adequately remedy those concerns. *See id.* (determining that recusal was the appropriate remedy to address partiality concerns that arose due to substantial campaign expenditures made to a West Virginia Supreme Court justice during his campaign). Recusal is an alternative that narrowly serves a state's impartiality interest without unnecessarily and excessively trampling upon First Amendment political speech.

Conclusion

Judicial campaign speech regulations must satisfy strict scrutiny. Because Florida's personal solicitation clause does not, it fails First Amendment review and is unconstitutional.

Respectfully submitted,

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